SUPREME COURT, U. S.

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FILED
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IN THE

Supreme Court of the United States

October Term, 1966

No. 757

JOHN MARSHALL,

Petitioner,

vs.

GRANT SAWYER, as Governor of the State of Nevada; NEVADA GAMING CONTROL BOARD, RAY J. ABBATICCHIO, JR., as Chairman, GEORGE ULLOM and NED A. TURNER, as members of the Nevada Gaming Control Board; NEVADA GAMING COMMISSION, MILTON W. KEEFER, as Chairman, NORMAN D. BROWN, BERT GOLDWATER, JAMES W. HOTCHKISS and F. E. WALTERS, as members of the Nevada Gaming Commission; D. I. OPERATING CO., a Nevada corporation; ALLEN ROEN; RUBY COLOD; DON BORAX; ARTHUR OSTAP; J. G. MURRAY.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Ninth Circuit affirming a judgment of the United States District Court for the District of Nevada which had denied relief to petitioner under the Civil Rights Act of 1871 for being ousted from, and prevented from being in, places of public accommodation.

Opinions Below.

The first opinion of the trial court in originally dismissing the action is unreported; it is set out in the appendix hereto as Appendix "A". The opinion of the

court below and the concurring opinion therein, reversing that judgment of dismissal, is reported at 301 F. 2d 639; it is set out as Appendix "B".

The opinion of the trial court on remand and trial is unreported; it is set out as Appendix "C". The opinion of the court below affirming the second judgment of the trial court is as yet unreported; it is set out as Appendix "D".

Attached hereto as Appendix "E" is the judgment of the court below [C. T. 227].[1]

Jurisdiction.

The judgment of the Court of Appeals [C. T. 229; Appendix "E"] was made and entered on August 10, 1966. No petition for rehearing was filed in that Court nor was any application filed in this Court for extension of time within which to petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 2101(c) and Rule 22(3) of this Court.

Question Presented.

May a state, consistent with the due process, equal protection and privileges and immunities guarantees of the Fourteenth Amendment to the United States Constitution and with the Bill of Attainder Clause (Art. I, §10, cl. 1) of the Constitution, without any showing

[1]The record consists of six volumes and exhibits. The volumes have been transmitted to this Court by the Clerk of the Court below per his letter dated September 26, 1966. Volume 1 (hereinafter designated as C. T.) contains the Clerk's Transcripts in the trial court and in the court below. The remaining five volumes consist of the Reporter's Transcript in the trial court and are hereinafter designated as R. T. The complaint in this action, which was before the court below as a part of the record on the first appeal, was not re-certified as a part of the record on the second appeal. It is set out hereto as Appendix "F".

of necessity therefore and without any showing that less drastic, more precise methods would not combat the supposed evil sought to be reached, completely, and by name, ban a United States citizen from the entire premises of a business establishment with many accommodations open to the public, only one portion of which is licensed for gaming, on the ground that said person is a person of notorious or unsavory reputation, or has an extensive police record?

Constitutional Provision and Statutes Involved.

The Fourteenth Amendment to the United States Constitution, Section 1, provides in part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article I, Section 10, Clause 1 of the United States Constitution, provides in part:

> "No State shall . . . pass any bill of attainder, . . ."

42 U.S.C. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Statement of the Case.

Facts.

The facts are essentially not in dispute.

At the end of 1959, the state respondents[2] were not pleased [R. T. 38] that certain magazine articles, such as Exhibit 2 in evidence, stated that some of the persons who actually held gambling licenses in Nevada were "characters of the underworld or on the fringes of it. Graduates of the lawless prohibition days, many with criminal records," [Ex. 2, p. 139] "hoodlums," [*ibid.* p. 142] "the list of licensees . . . reads like a page out of a U.S. Senate investigation into the Cleveland underworld." [*ibid.* p. 143] "one time bootlegger and gambling figure," [*ibid.*] "served a three-year term for tax evasion," [*ibid.*] "ex-bootlegger and gambler" [*ibid.*] "closely associated with an important member of the Capone gang." [*ibid.*]. To combat these statements concerning actual licensees,[3] "to protect the good name of the legal gambling industry in the State of Nevada and, of course, the State of Nevada itself," [R. T. 33] respondents [R. T. 33] hit upon the idea of picking

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[2]Unless otherwise noted, "respondents" in this petition refers to the State respondents, Grant Sawyer, Governor of Nevada, the Nevada Gaming Control Board and Gaming Control Commission and the respective members thereof. When the non-state respondents are referred to, they will be so noted, *i.e.*, as the non-state respondents, they being the D. I. Operation Co., doing business and operating the Desert Inn Hotel in Las Vegas, Nevada, and employees thereof. (Appx. F.)

[3]That licensees do have extensive police records [R. T. 59], are considered by respondents to have unsavory reputations such as respondents attribute to petitioner [R. T. 66], "have a reputation as being a rum-runner in prohibition or a gambling racketeer or something like that" [R. T. 129], had a tax evasion conviction [R. T. 132] "some had a reputation of being connected with mobs" [R. T. 477] is conceded by respondents [references Op. Cit. this f.n. and R. T. 462, 479].

out 11 men, putting their names, pictures, descriptions, FBI and CII or KCPD number in a "black-book" [Ex. 1] and on March 29, 1960, advising the owners of the 12 major Las Vegas strip hotels and the Hotel Fremont in downtown Las Vegas (and later, the other major clubs in the Lake Tahoe-Reno area [R. T. 44-45]) that the presence of these men in their establishment was to be prevented "in order to avoid the possibility of license revocation." [Ex. 3, R. T. 50].

The book was compiled without "independent investigation of these people." [R. T. 36].

The hotels, on the "premises" of which respondents decreed petitioner may not be [R. T. 179], are large establishments, each of them covering many acres, all of them serving the public, including children, in the manner hotels in cities and resort areas normally do, and offering the usual non-gambling facilities such hotels do. See, generally, plaintiff's Exhibits 6A through 6H. The Desert Inn [Ex. 6B], for example, is typical. It has hotel rooms [R. T. 167], lobby [*ibid*], coffee shop [*ibid.*], show room [*ibid.*], lounges [*ibid.*], swimming pool [*ibid.*], golf course [*ibid.*], concession stands [*ibid.*], ladies' dress shop [*ibid.*], men's shop [*ibid.*], beauty shop [*ibid.*], drug store [*ibid.*], novelty shop [*ibid.*], barber shop [*ibid.*], upstairs room for dancing [*ibid.*], a health club [R. T. 171]. To go to such places as the swimming pool, the cigar stand, to register at the hotel, the health club, it is not necessary to go through the gambling casino [R. T. 168, 171]. The shopping arcade is outside the main building [R. T. 167]. The hotel holds golf tournaments that attract large numbers of people [R. T. 168].[4] Rooms are

[4]Petitioner plays golf [R. T. 203].

rented to families with children [R. T. 168]. Children are permitted anywhere on the hotel premises, including the shows, except the gaming casino, the slot machines and the bar [R. T. 169]. Convention facilities are available [*e.g.*, Ex. 6A].

The hotels are centers of public gatherings to which the public is invited for many purposes. See, generally, Exhibits 7A through 7I. For example, the Desert Inn presents the "Tournament of Champions" [Ex. 6B] and the "Challenge Golf Series". A story in the Las Vegas Review Journal for September 18, 1963 [Ex. 7A, p. 24, cols. 1, 2, 3], announced:

> "The public is invited free to attend all three scheduled contests and tee-off time has been set for 8 a.m."

The Chamanettes, a women's organization, had its convention at the Sahara Hotel [Ex. 7B, p. 14, cols. 4, 5].

The Thunderbird Hotel was the place selected for a press conference to announce plans for a "Disneyland" Fun Park in Las Vegas [Ex. 7C, p. 9, cols. 2-6].

The National Conference of Christians and Jews held its annual meeting banquet at the Virginia City Room of the Thunderbird Hotel on September 26, 1963. The public was invited. The Hon. Howard W. Cannon, United States Senator, gave the address [Ex. 7D, p. 7, col. 102; p. 20, cols. 7-8].

The Las Vegas Chapter of the American Institute of Banking met in the International Room of the Stardust Hotel on September 7, 1963 [Ex. 7F, p. 12, col. 3]. The National Society of Public Accountants held a meeting at the Flamingo Hotel during the week of August 22, 1963 [Ex. 7G, p. 8, col. 5]. And the Saints

and Sinners, well known organization to assist charities involving children, held its organizing meeting in the Thunderbird Hotel's Virginia City Room on August 25, 1963 [Ex. 7H, p. 5, col. 3].

Mortimer Caplin, United States Commissioner of Internal Revenue, gave a talk sponsored by the Las Vegas Men's Club, which was open to the public, at a dinner banquet at the Thunderbird Hotel on August 21, 1963.

And, of course, the various shows given by the hotels advertise and invite the public to attend [Ex. 7D, p. 9, col. 4; p. 10, col. 8; p. 28; Ex. 7E, p. 2, cols. 5-8; p. 5, cols. 1, 2; p. 7, cols. 3-4, 7-8; p. 9, cols. 7-8; p. 11, cols. 2, 8; p. 14, cols. 3-6].

Despite all this public, non-gambling activity that goes on, respondents, speaking as and for the State of Nevada, insist that petitioner cannot step foot, not one inch, on the property. This includes going to the coffee shop [R. T. 72], the swimming pool [*ibid.*], registering at the hotel [*ibid.*], going to the golf course [*ibid.*], seeing a show [*ibid.*]. The asserted prohibition ordained by respondents also includes petitioner's not having lunch or dinner at one of the hotels with his attorneys while he was litigating this case before the trial court [*cf.* R. T. 242-244].

Petitioner had lived in Las Vegas for about four years during the 1950's [R. T. 194]. He engaged in business there [*ibid.*], bought land there [R. T. 196] and still owns some of it [*ibid.*]. He has had occasion to return to Las Vegas on business on numerous occasions [R. T. 196], some of which were concerned with litigation over the property, including the taking of depositions [R. T. 213-214].

In October of 1960, petitioner had to come to Las Vegas on business and he registered at the Tropicana Hotel [R. T. 198]. While there, representatives of the hotel came to him, told him he was in the black-book, asked him to leave and told him that if he did not, they would lose their license [R. T. 199]. On another occasion, while at the Tropicana, his services were curtailed, and so for that reason he left [R. T. 200].[5]

That week, wherever petitioner went, he was asked to leave because of the pressure from respondents [R. T. 200-202, 204, 206, 78]. In consultation with respondent Governor, respondent Keefer and respondent Turner, it was decided that, for the first time in this manner [R. T. 161], respondents "would institute an examination of dice and cards to include the hotels, or most of them, that had been catering to" petitioner [R. T. 81-82]. This, so that the hotels "will get the message" [R. T. 84]. This was done with a battery of 18 or 20 Gaming Board agents going into the pits to make this "routine examination of their dice and cards" [R. T. 85]. This was done twice during that week [R. T. 86] and in addition, on the second occasion, the dealers and pit bosses were asked to show their work cards [R. T. 87]. This "checking" was done at the Desert Inn, the agents coming in "like gangbusters" [R. T. 181], or, as described by the Attorney General of the State of Nevada, by the use of "muscle" [R. T. 445], was detrimental and did not

[5]This curtailment of services was in accordance with a suggestion made by respondents when they were handing out the black book and letter [R. T. 48, 49, 79] together "with an implied threat of formal action" as to suspension or revocation of license should the licensees "fail to make proper efforts to comply with the state's request for cooperation" [R. T. 50].

look good to the customers [R. T. 160], but the non-state respondents "got the message."

The next night, October 28, 1963, petitioner came in to the Desert Inn, sat in a booth in the lounge where there is no gambling of any kind [R. T. 162]. Because they feared loss of their licenses, and the presence of respondents' agents [R. T. 189, 206, 210], the non-state respondents, Roen and Kolod, and their employees Borax and Murray, required petitioner to leave [R. T. 163-165, 183, 189, 207] which he did, under protest and against his will [R. T. 164, 207-208]. All this was done in public, in the presence of large numbers of persons [R. T. 165, Pltf. Exs. 4, 5]; the foyer was crowded, the show just having ended, people were going in and out in droves [R. T. 92].

At no time was any of plaintiff's conduct objectionable to either the non-state [R. T. 166, 173, 183, 185, 191-192] or the state [R. T. 98, 118, 121] respondents. He was not boisterous, had created no disturbance and had conducted and behaved himself properly at all times [*ibid.*]. Indeed, the respondents are not concerned with petitioner's conduct at all [R. T. 121].

Following his ejection from the Desert Inn, petitioner went to the Sahara Hotel where he met some friends at the bar [R. T. 211], started to have a drink with them and was again told to leave because the Gaming Control men were there and petitioner was in the black book [R. T. 211-212].

At a later date, petitioner was required to be back in Las Vegas to give a deposition in connection with the litigation of his property [R. T. 213-214], was in his room at the Dunes Hotel late at night [R. T. 118, 212] when a representative of the hotel came to his

room, knocked on the door and told him to leave because otherwise, they, the hotel, would lose their license [R. T. 213]. Picturesquely, Mr. Weiman of the Dunes Hotel, said [R. T. 213]: "Be my guest somewhere else, but please get out of here." The occasion for this conduct on the part of the hotel was the contacting of Mr. Weiman by the Chairman of the Gaming Control Board, advising him that petitioner was registered at the hotel, that such registration "could do nothing but bring heat on the hotel," suggesting "that Mr. Wyman (*sic*) take appropriate action" and leaving no doubt in Mr. Weiman's mind that "if something wasn't done . . . his license would be in jeopardy" [R. T. 117]. Here, again, there was no suggestion nor complaint, that petitioner was committing any unlawful act on the premises, nor that he was gambling nor even in the casino [R. T. 118], and with the full assumption by the Board Chairman that petitioner was in his room for sleeping purposes [*ibid.*].

In June of 1963 [R. T. 120] just a few months before the start of the trial of this case, petitioner was with his wife and niece who wanted to see a show at the Flamingo Hotel [R. T. 214]. As is the custom in such matters, petitioner phoned and made reservations [*ibid.*] and they went to see the show [*ibid.*]. But, calm emjoyment of the entertainment was not to be petitioner's, nor his wife's nor niece's lot. Even before he went in and while sitting in a bar-dining room, away from the casino [R. T. 214-215], the Gaming Control Board representative caused the representative of the hotel to

tell petitioner "to get out, to go" [R. T. 215]. When petitioner told Mr. Sims that "we had reservations, that the girls wanted to see the show, and we weren't going to bother anybody, nobody will probably even see me and I would just go in and see the show and then I'd leave." [*ibid.*]. Mr. Sims thought, naively as it turned out, that that would be all right [*ibid.*].

But it was not all right with the respondents. During the very performance, so insistent were the Gaming Control Board members, that Mr. Sims was compelled to go over to petitioner, in the theatre, and ask him to leave [*ibid.*]. When petitioner told Mr. Sims that he was going to watch the show and then leave, Mr. Sims advised that Mr. Lippold, the Gaming Control Board member, was sitting right there watching them, and was going to watch Sims escort petitioner to the door, which he did [R. T. 216]. The Gaming Control Board members, including the Chairman, knew that petitioner was with his wife and niece [R. T. 121] and here, again, no complaint of any impropriety on the part of Marshall was made [*ibid*].

The trial court gave judgment for respondents denying both damages and injunctive relief. [C. T. 190]. The court below affirmed [C. T. 229]. Hence, this petition.

Basis for Federal Jurisdiction in the Court of First Instance.

The District Court had jurisdiction under 28 U.S.C. 1332(a)(1) (diversity of citizenship) and under the Civil Rights Act (28 U.S.C. 1343[3]).

Reasons for Granting the Writ and Argument Amplifying Same.

This case presents a question going to the very marrow of our democratic system. Certiorari should be granted to determine whether or not the States have the power to make pariahs out of individuals and prevent them from being in places of ordinary public accommodation, based not upon their conduct in such places, but solely because of their so-called notorious or unsavory reputations or because they have extensive police records.

Although both the state and non-state respondents found no fault with petitioner's conduct, and no harm of any kind was shown to have occurred to either the hotels, the State of Nevada or its gaming industry, from the mere presence of petitioner playing golf or taking his wife to dinner at the hotel or having lunch at a restaurant on the premises with his lawyers, Nevada has said petitioner can do none of these things (nor even sleep in a room) simply because there is located at another part of the premises, a gambling room.

The court below sidestepped the basic issue in the case—namely, that before a state can so drastically curtail the personal right to freedom of movement (*Edwards v. California,* 314 U.S. 160, 178, 181 [concrg. ops.]; *Crandall v. Nevada,* 6 Wall. [U.S.] 35; *Williams v. Fears,* 179 U.S. 270, 274; *Kent v. Dulles,* 357 U.S. 116, 125-126; *Dayton v. Dulles,* 357 U.S. 144; Chafee, "Three Human Rights in the Constitution", 162, 193 [1956]), a showing of compelling need must be made (*Bates v. Little Rock,* 361 U.S. 516, 524; *Gibson v. Florida Investigating Committee,* 372 U.S. 539, 546) and that even if this be shown, such

freedoms cannot be curtailed without a further showing by the State that no alternative method will combat the abuse (*Sherbert v. Verner*, 374 U.S. 398, 407) or that the end cannot be more narrowly achieved (*Aptheker v. Secretary of State*, 378 U.S. 500, 508)—by saying (Appx. D, that because petitioner did not attack the constitutionality of the Regulation[6] pursuant to which respondents assertedly promulgated their letter and "black-book," he could not complain that the facts did not support the deprivation visited upon him. In this, we submit, the Court below seriously erred.

It was not necessary for petitioner to have challenged the constitutionality of the Regulation in order to obtain redress for the deprivation of his rights. Not only is it the law that when constitutional rights are involved in a Civil Rights Act suit, the fact that the State permits or prohibits (*Monroe v. Pape*, 365 U.S. 167, 183) the particular conduct complained of, does not prevent the federal courts from making their own independent appraisal of the facts (*Oyama v. California*, 332 U.S. 633, 636; *Cassell v. Texas*, 339 U.S. 282, 283; *Niemotko v. Maryland*, 340 U.S. 268, 271), but the lack of justifi-

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[6]Nevada Gaming Commission and State Gaming Control Board Regulation 5.010(3)(e) provides: "The commission and the board deem that any activity on the part of a licensee, his agents or employees which is inimicable to the public health, safety, morals, good order and general welfare of the people of the State of Nevada or which would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry is an unsuitable manner of operation. Without limiting the generality of the foregoing, the following acts or omissions may be deemed unsuitable manners of operation:

"(e) Catering to, assisting, employing or associating with, either socially or in business affairs, persons of notorious or unsavory reputation or who have extensive police records, or persons who have defied congressional investigative committees or other officially constituted bodies acting on behalf of the United States or any state, or persons who are associated with or support subversive movements."

cation for the treatment accorded him was the very basis for petitioner's complaint (App. F), as to which the court below on the first appeal said that a cause of action was stated (Appx. B, p. 20). Indeed, the very basis of Judge Pope's concurring opinion on that first appeal (Appx. B, p. 21) was that on the trial of the case, the facts would be developed which would show the justification for Nevada's action. And, in fact, the trial was devoted, from the standpoint of respondents, to an attempt to show justification for their action [R. T. 389-534]. Respondents were unable to make such a showing. But the court below ignores this—it refused (Appx. D, p. 56) to pass upon petitioner's argument—by saying that the Regulation is sufficient. In so doing, the court of Appeals passed over the rule, as we have mentioned, that where personal constitutional freedoms are involved, the federal courts will themselves examine the evidence to see that correct constitutional principles were applied. In addition to the cases above mentioned, see also, *Wood v. Georgia*, 370 U.S. 375, 386; *New York Times Co. v. Sullivan*, 376 U.S. 254, 285. Since no justification was shown for the infringement upon petitioner's personal freedom, judgment should have been for him. (*Sherbert, Aptheker, supra*).

The court below disagrees with the principle expressed by Mr. Justice Black, concurring in *Joint Anti-Facist Refugee Committee v. McGrath*, 341 U.S. 123 at 143: ". . . I deny . . . that the Constitution permits the executive officially to determine, list and publicize individuals and groups as traitors and public enemies, . . ." Petitioner believes this enunciation to be correct. In any event, hearing should be granted to decide the precise question posed here, as to whether the Constitution does permit the executive so to do.

Conclusion.

For the state to designate individuals as "undesirables" and, based thereon, to prohibit them from engaging in ordinary lawful conduct is the exercise of a drastic power. whether a state has such power is a question which should be determined by this Court.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

[Title of Court and Cause]

Order Granting Motion to Dismiss, and Dismissing Complaint as to All Defendants.

I. BACKGROUND.

This is a companion case to *Dragna v. Nevada Gaming Commission,* Civil No. 348. Jurisdiction is predicated on 28 U.S.C. sec. 1348 (1), (3) and (4), which statute gives this Court jurisdiction over suits arising from alleged violations of 42 U.S.C. secs. 1963 and 1965 (3). Named as defendants are those entities and individuals named as defendants in *Dragna,* plus the Hon. Grant Sawyer, the D. I. Operating Co., and certain of the latter's employees.

In essence, plaintiff alleges a conspiracy between the defendant state officials "to bar plaintiff from the State of Nevada." This policy allegedly was implemented by insuance of the "black book" and letter referred to in our opinion of this date in Dragna. Said publications allegedly referred to plaintiff by name. Plaintiff further alleges that on October 28, 1960, the defendant employees of the Desert Inn "ousted plaintiff, under threat of physical force, from the hotel premises." Plaintiff further alleges that as a result of the alleged ousting, he was "damaged, suffered humiliation, embarrassment, loss of the right to public accommodation and to freedom of movement." He finally alleges that he "cannot stay at a hotel in the State of Nevada." He therefore prays for damages in the sum of $100.00 against each of the state defendants; an injunction restraining the state defendants from "giving effect to said policy and action of keeping plaintiff out of the

State of, and hotels in, Nevada . . .;" and for damages of $150,000.00 against the non-State defendants.

By motion filed January 30, 1961, the state defendants have moved dismiss the complaint.

II. THE FEDERAL ABSTENTION ISSUE.

As mentioned earlier, this is a companion case to *Dragna v. Nevada Gaming Commission.* The cases are virtually identical. This much is admitted by plaintiff here, for in his memorandum in Support of Motion for Preliminary Injunction, filed on December 22, 1960, he states at page two thereof that "the issues are similar." The only differences which even he alleges are that "here no regulation is being challenged. Factually, the case also differs from *Dragna* in that physical force, threatened in *Dragna,* has actually occurred against plaintiff here." We shall deal in order with those alleged differences between the two cases.

First, plaintiff makes great point of the fact that his complaint does not, in terms, challenge the validity of any state statute. We discussed this issue at length in our opinion in *Dragna* and adhere to our ruling that whether or not Regulation 5.010 (3) is *said* to be an issue, "this Court cannot see how, either as a practical matter or as one of sheer logic, we can divorce the Regulation from this litigation. The Regulation is intimately bound up with virtually every potential violation of plaintiff's civil rights which he could ever think of." Save for minor differences, these two cases are the same; in fact, they probably should be consolidated. We refuse to believe that differences in the Language used in the respective complaints should compel us to invoke the doctrine of federal abstention in one case

and not in the other. "It is the substance, not the form, which should be our concern." *United States v. New York, New Haven & Hartford Railroad Co.*, 355 U. S. 253, 263 (1957).

Secondly, plaintiff seeks to avoid the federal absention doctrine by characterizing this case as being one which involves "official violence." He goes on to assert that the principles of *Hague v. C.I.O.*, 307 U. S. 496 (1939 forbid its exercise. But, the *Hague* case has no bearing on whether abstention is appropriate, since it was decided before *Railroad Commission v. Pullman Co.*, 312 U. S. 496 (1941), which established the doctrine, and likewise was before those cases which expanded upon the policy enunciated by *Pullman*. This Court is of the opinion that the very theory behind the abstention doctrine, as set out in the cases cited and discussed in our opinion in Dragna, militates against over concern for the fact that there may be a tort involved, at least in the context of the abstention doctrine. As we pointed out in *Dragna*, the state courts are capable of giving to plaintiff whatever relief, if any, to which he may be entitled.

Thirdly, plaintiff attempts to mak a great point out of the fact that here, unlike *Dragna*, there is a demand for damages. We point out initially that plaintiff only asks for nominal damages against the defendant state officials. His primary demand for relief is for an injunction. Assuming that dismissal is proper with respect to that portion of the complaint which asks for an injunction, as we held it was in *Dragna*, then sheer logic compels us to ignore a demand only for nominal damages. The whole theory of abstention moves us to refuse to draw distinctions merely because dam-

ages are demanded. For example, assume, *solely* for the purposes of argument, that plaintiff will prevail in this litigation. An award of damages, nominal or otherwise, would, as a practical matter, just as effectively interfere with the State's administration of its own laws as would granting an injunction. It was the desire to avoid just such undue interference, pending state determination of relevant issues, which gave birth to the federal abstention doctrine. See cases discussed in our opinion in *Dragna*. We cite, as being a case where the *Pullman* doctrine was invoked, a relatively recent case involving damages, *Upjohn Co. v. Peoples Service, Drug Stores, Inc.*, 173 F. Supp. 434, (D Md. 1959).

In short, we reject plaintiff's contention that this case has "differences" which eliminate the possibility of federal abstention. Speaking of this issue, the Supreme Court has stated: "*Regardless of differences in particular cases,* however, the Court's lodestar of adjudication has been that the [civil rights] statute, 'should be construed so as to respect the proper balance between the States and the federal government in law enforcement.' [Citation omitted] Only last term we reiterated our conviction that the Civil Rights 1st 'was not to be used to centralize power so as to upset the federal system'." *Stefanelli v. Minard,* 342 U. S. 117, 121 (1951). (emphasis added.)

Finally, we note that this section has been brought not only against state officials, but against a private corporation and certain of its employees. This Court has grave doubts as to whether it has jurisdiction over these private parties. This is because the complaint says that jurisdiction is based on the civil rights statutes, and yet it is perfectly clear that these statutes do not

apply to the actions of individuals not acting under color of state law. See Collins v. Hardyman, 341 U. S., 651 (1951). There is no allegation here that the non-State defendants were acting under color of state law.

In any event, we do not find it necessary to pass on the jurisdictional question as such. Suffice it to say that plaintiff's whole theory is that the actions of the non-state defendants were intimately bound up with those of the state defendants. That fact would make it ludicrous for this Court to retain the case as to some of the defendants and not as to the rest. Accordingly, we are of the opinion that plaintiff should seek all his remedies against all of the defendants in the state courts.

III. ORDER.

IT IS ORDERED, that the motion to dismiss be, and the same hereby is, granted, and the complaint will be dismissed as to all of the defendants.

Dated at Las Vegas, Nevada, this 10th day of March, 1961.

JAMES R. ROSS
United States District Judge

FILED
MAR 10 1961
OLIVER F. PRATT, Clerk
by FRANCES BULLOCH, Deputy

APPENDIX B.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

John Marshall, Appellant, vs. Grant Sawyer, as Governor of the State of Nevada, et al., Appellees. No. 17,322. Mar. 7, 1962.

On Appeal from the United States District Court for the District of Nevada.

Before: Pope, Hamley and Koelsch, Circuit Judges.

Hamley, Circuit Judge:

John Marshall, having been assertedly ousted from Desert Inn Hotel in Las Vegas, Nevada, brought this action for damages and injunctive relief, invoking the Civil Rights Act, 28 U.S.C.A., § 1343 (1), (3) and (4), and 42 U.S.C.A. §§ 1983 and 1985(3). Named as defendants were the Governor, Gaming Control Board and Gaming Commission of Nevada, the members of the board and commission, D. I. Operating Co., a Nevada corporation which operates the Desert Inn Hotel and five employees of that company. The action was dismissed on the ground that the federal court should abstain and remit plaintiff to his state court remedies. Plaintiff appeals.

It is alleged in the complaint, among other things, that the defendant state agencies and officials entered into an agreement and adopted a policy to discriminate against and to bar plaintiff from registering or obtaining food service, sitting in the lounge or foyer, or being in the casino or on the premises of any hotel

in Nevada licensed to operate a gambling casino, and to bar him from the state of Nevada as a person designated by them as "undesirable." It was part of this agreement and policy, plaintiff alleged, that the described objectives would be accomplished by coercion, intimidation and inducement by the state defendants, taking the form of threats against hotels in Nevada that they would lose their casino licenses if appellant were permitted in these hotels.

In order to effectuate this agreement and policy, plaintiff alleged, defendants engaged in the following acts:

1. The board and commission and their members compiled, promulgated, published and issued an 8" x 10" booklet bound in black, commonly designated as the "black book" containing the names and pictures of persons, including plaintiff, designated as and deemed, "undesirable" by those defendants, all of this being done without notice or hearing to the persons so designated, including plaintiff;

2. The board and commission and their members on or about March 29, 1960, distributed copies of the black book to hotel operators in the state of Nevada accompanied by a letter over the signature of defendant Abbaticchio, chairman of defendant board, reading in part as follows:

"The attached booklet which will be revised and expanded periodically, contains descriptive data with photographs concerning 11 persons (here they are listed, including appellant).

"In order to avoid the possibility of license revocation for 'unsuitable manner of operation' your immediate cooperation is requested in preventing the presence in any licensed establishment of all 'persons of notorious or unsavory reputation' including the above individuals as well as those who subsequently may be added to this list."

3. The board and commission and their members, personally or through their representatives, orally informed the recipients of the black book and letter that unless the recipients acceded to the "request" of those defendants, as outlined in the letter, the recipients would lose their licenses;

4. On the evening of October 28, 1960, while plaintiff was sitting in the lounge of the Desert Inn Hotel, not committing or having committed any public offense, Abbaticchio and other representatives of the board and commission, for the purpose of effectuating the described agreement and policy, requested and induced employees of the hotel, defendants herein, to oust plaintiff from the hotel;

5. Acceding to the above-described request and inducement, the five defendants who are employees of the defendant hotel operating company, ousted plaintiff from the hotel premises under threat of physical force, this being accomplished in the presence of a large number of persons;

6. In order to harass and intimidate hotel operators into ousting plaintiff from the Desert Inn Hotel and other hotels in Las Vegas, the board and commission and members thereof, led by Ab-

baticchio, on the evening of October 28, 1960, and other evenings, confiscated cards and dice in the casinos of various hotels in Las Vegas, including the Desert Inn Hotel, while games were in progress and in full view of public patrons such action being extremely detrimental to the gambling business of these hotels, as the state defendants well knew and intended;

7. On or about October 29, 1960, Abbaticchio, having in mind the ouster of plaintiff from the Desert Inn Hotel on the previous evening, publicly stated:

"There has been some failure of certain Strip operators to abide by an agreement with the control board not to entertain or provide or furnish facilities or cater to those people we consider undesirable and detrimental to the gaming industry because of their association with the underworld.

. . . .

"We are attempting to get them (the reneging Strip operators) to cooperate with the control board."

8. On or about November 2, 1960, defendant Sawyer, Governor of Nevada, having in mind what had occurred at the Desert Inn Hotel on the evening of October 28, 1960, publicly stated:

"I agree with any measures necessary to keep the hoodlums out of Nevada. The operators have a great responsibility to cooperate.

"We might as well serve notice on underworld characters right now they are not welcome in Nevada and we aren't going to have them here."

Plaintiff sought damages in the amount of $100 from each of the state defendants and in the amount of $150,000 from all of the remaining defendants. The injunction which he sought was one which would restrain and enjoin the state defendants, their agents, employees or anyone acting in concert with them or in their behalf:

> "from giving effect to said policy and action of keeping plaintiff out of the State of, and hotels in, Nevada through said Black Book or said letter of March 29, 1960, and from causing, coercing or inducing the operators or employees of hotels in Nevada, by threat of cancellation of license or otherwise, to bar or eject plaintiff from their premises, or to refuse to give service or afford accommodations to plaintiff on the same basis as any other citizen;"

Filed with the complaint was a motion for a preliminary injunction seeking temporary relief of the same kind as that sought in the prayer for a permanent injunction. Defendant D. I. Operating Co., and the five individual defendants who are employees of that company, joined in an answer denying most of the essential allegations of the complaint. The state defendants filed no answer but joined in a motion under Rule 12(b), Federal Rules of Civil Procedure, 28 U.S.C.A., to dismiss the complaint, five grounds being urged, namely: (1) the federal courts should abstain, (2) no grounds for equitable relief were alleged, (3) the complaint did not state a claim upon which relief can be granted, (4) the complaint shows on its face that each such defendant is protected by the defense of official immunity, and (5) the federal district court lacks jurisdiction.

Accompanying the motion to dismiss was the affidavit of defendant Abbaticchio, chairman of defendant board, in which facts were alleged concerning the preparation and issuance of the so-called black book and accompanying letter, and the policies and enforcement methods of that state agency with reference to the regulation of gambling in Nevada. While this affidavit presented matters outside the pleading, it was apparently regarded by the court as directed only to the motion for a temporary injunction, and such new matters were excluded from consideration in passing on the motion to dismiss. The court therefore did not treat the motion as one for a summary judgment, as it would have been obliged to do had the new matters not been excluded from consideration. See Rule 12(b) *supra*.

As before noted, the motion to dismiss was granted on the sole ground that the district court should abstain. While the non-state defendants had not moved to dismiss the complaint the court also dismissed the complaint as to them. Having held abstention appropriate as to the state defendants, the court determined that the alleged actions of the state and non-state defendants were so intertwined that it would be "ludicrous" to retain the case as to some of the defendants and not as to the others. The non-state defendants have not appeared as appellees in this court.

At the outset we must consider, on our own motion, whether the appeal must be dismissed because not taken from an appealable order. An order which dismisses a complaint without expressly dismissing the action is not, except under special circumstances, an appealable order. *Javor v. Brown*, 9 Cir., 295 F.2d 60.

The special circumstances which will permit this court to regard such an order as final and appealable must be such as to make it clear that the court determined that the action could not be saved by any amendment of the complaint which the plaintiff could reasonably be expected to make, thereby entitling plaintiff to assume that he had no choice but to stand on his complaint. *Asher v. Ruppa,* 7 Cir., 173 F.2d 10. See also *Gardner v. J. J. Newberry Co., Inc.,* 9 Cir., 239 F.2d 178; *Williams v. Peters,* 9 Cir., 233 F.2d 618.

We think such circumstances are present in this case. The order dismissing the complaint herein is not based upon the ground that appellant has failed to state a claim but on the ground that, whether or not a claim has been stated, the federal court should abstain. In view of this ruling there was no way in which plaintiff could, by amending his complaint, avoid dismissal of the action. Faced with this barrier to further district court proceedings, plaintiff's appeal evidences a determination to stand on his complaint and accept the order as a dismissal of the action. We conclude that the order is appealable.

Another preliminary question, going to the jurisdiction of the district court to enter the order under review, must also be considered. This question is whether, by reason of the prayer for an injunction restraining and enjoining state officials in certain respects, a single district judge, as distinguished from a three-judge court convened under 28 U.S.C.A. §§ 2281, 2284, had

jurisdiction to dismiss the action on the ground of abstention.[1]

This question was not discussed in plaintiff's opening brief on appeal. In the brief filed by the state defendants, it was argued that § 2281 is inapplicable. Plaintiff took the same position in its reply brief. When the question was raised from the bench during oral argument, plaintiff and the state defendants adhered to this position.

Plaintiff, however, filed a post-oral argument memorandum in which a change of view was indicated. It was plaintiff's new position that the case was one for a three-judge court, and if the complaint states a cause of action, the judgment of dismissal should be reversed and the cause remanded for the convening of such a court. Appellees filed an answering memorandum in

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[1] § 2281 reads as follows:

"Injunction against enforcement of State statute; three-judge court required

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

The first paragraph of 28 U.S.C.A § 2284(5) reads as follows:

"Any one of the three judges of the court may perform functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing."

which they adhered to their previously-stated position that a three-judge court was not required.

Section 2281, requiring a three-judge court, is applicable where the plaintiff seeks to enjoin the enforcement, operation or execution of a state statute, or an administrative order of general application representing considered state policy, on the ground that such statute or order is in violation of the Constitution of the United States. See *Hatfield v. Bailleaux*, 9 Cir., 290 F.2d 632, 635.

In his complaint, summarized above, plaintiff does not attack the validity of any state statute. Nor does he attack the validity of any numbered regulations adopted by the Nevade Gaming Commission.[2] He does, however, in addition to challenging certain conduct by individual defendants, attack the validity of the black book and the letter of March 29, 1960, which accompanied it, compiled, published, distributed and enforced as alleged. While the attack thereon is not expressly

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[2]Regulation 5.010(3)(e), promulgated by that agency, which is not mentioned in the complaint reads as follows:

> "(3). The commission and the board deem that any activity on the part of a licensee, his agents or employees which is inimicable to the public health, safety, morals, good order and general welfare of the people of the State of Nevada or which would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry is an unsuitabe manner of operation. Without limiting the generality of the foregoing, the following acts or omissions may be deemed unsuitable manners of operation:
>
> . . . .
>
> "(e) Catering to, assisting, employing or associating with, either socially or in business affairs, persons of notorious or unsavory reputation or who have extensive police records, or persons who have defied congressional investigative committees or other officially constituted bodies acting on behalf of the United States or any state, or persons who are associated with or support subversive movements."

stated to be on constitutional grounds, this is the fair intendment of the complaint, as the appellees concede.[3]

The question, then, is whether this black book and the accompanying letter of March 29, 1960, compiled and distributed for the purposes and enforced in the manner alleged, constitute an administrative order of general application representing considered state policy. If so, the single district judge was, in view of §§ 2281 and 2284, without jurisdiction to dismiss the action on the ground of abstention. *Idlewild Bon Voyage Liquor Corporation v. Rohan*, 2 Cir., 289 F.2d 426, 429.

This booklet and accompanying letter have some of the attributes of an administrative order of general application. According to the complaint, the booklet represented state policy and was distributed to all hotels in the state which operate gambling casinos. It was not limited in its effect to a particular and contemporaneous transaction, but extended to future activities at hotels all over the state. It was stated in the accompanying letter that the booklet would be "revised and expanded" periodically, and recipients were advised to give effect to the information therein contained in order to avoid the possibility of license revocation.

However, when the content of the booklet and letter are examined, it is seen that they are only informational and advisory releases without any immediate operative effect as administrative orders. The booklet is limited to a recital of the findings made by the state agencies and officials concerning the alleged unde-

[3]In addition to the allegations of the complaint summarized above, there is quoted in the complaint portions of 28 U.S.C.A., § 1343, in which reference is made to the rights, privileges and immunities secured by the Constitution of the United States.

sirable character of identified individuals. Insofar as it is described in the complaint, the booklet does not order licensees to do, or refrain from doing, anything. The letter calls attention to the booklet and requests "co-operation" in excluding the identified individuals from their establishments. Neither the booklet nor the letter were promulgated in the manner prescribed by statute for administrative orders of general application. See N.R.S. § 463.145, 150.

Section 2281 is to be closely construed to the end that only those cases which plainly fall in the class therein described be referred to three-judge courts. *Phillips v. United States,* 312 U.S. 246, 251. An agency determination which is primarily a finding of fact, is not the kind of an order contemplated by § 2281. *Ex Parte Williams,* 277 U.S. 267.[4]

We hold that the agency action sought to be enjoined in this case does not draw into question the validity of a state regulation or administrative order of the kind referred to in § 2281, and that it was not necessary to convene a three-judge court. The single district judge thus had jurisdiction to entertain the suit.

This brings us to the question of whether the court erred in dismissing the action on the ground that the federal court should abstain.

The avoidance of the obligation of federal courts to decide cases in which they have jurisdiction can be justified under the doctrine of abstention "only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an impor-

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[4]See also, *Cully v. Interstate Natural Gas Co.,* 292 U.S. 16; *Martin v. Producers Pipeline Co.,* 6 Cir. 113 F.2d 817.

tant countervailing interest." *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189.

The exposing to state construction or limiting interpretation of state statutes fairly open to interpretation, before federal courts are asked to decide upon their constitutionality, has been held to be an important countervailing interest which would be clearly served by abstention. *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 176. This is true, the court held, because (1) the state courts might give the state statute a construction which would avoid in whole or in part the necessity for federal constitutional adjudication, and (2) if the state adjudication did not moot the federal constitutional adjudication, the federal judgment would at least "be based on something that is a complete product of the State, the enactment as phrased by its legislature and as construed by its highest court; . . ." *Harrison*, at 178.

No such countervailing interest could be served by abstention in the instant case, since the constitutionality of a state statute is not here in issue.

What is here in question is the asserted illegality of the conduct of the state and non-state defendants, rather than the validity of the statutes and general regulations under which they may have acted. It is nevertheless true that, were an injunction the only relief sought, abstention would serve the same countervailing interest as in the case of a challenge to the validity of a state statute. A state court might well determine that the conduct complained of was unauthorized by state law and should therefore be enjoined on that ground, without reaching the federal constitutional question.

But in this Civil Rights Act case plaintiff seeks damages as well as injunctive relief. The only elements

which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States.

The defendants' conduct was engaged in under color of state law if they were clothed with the authority of the state and were purporting to act thereunder, whether or not the conduct complained of was authorized or, indeed, even if it was proscribed by state law. *Monroe v. Pape,* 365 U.S. 167, 187; *Screws v. United States,* 325 U.S. 91, 111. Whether there is "color" of state law is a federal, not a state question. Were this not true a state, acting through its legislature or courts, would have it within its power to immunize its agencies and officials from liability under the Civil Rights Act.[5]

The second essential element in a Civil Rights Act damage case—conduct which deprives the plaintiff of a constitutional right—is also a question of federal law. The meaning or validity of state statutes or regulations is immaterial to the resolution of this question.

The abstention doctrine does not permit federal district courts to defer to the state courts for the decision of federal constitutional questions. *United States v. Livingston,* 179 F.Supp. 9, 12, affirmed per curiam *Livingston v. United States,* 364 U.S. 281.

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[5]The federal character of such a question was exemplified recently in *Burton v. Wilmington Parking Authority,* 365 U.S. 715. The Supreme Court of the United States overturned a ruling by the Supreme Court of Delaware that the conduct engaged in by a particular restaurant did not constitute state action.

It has not been argued that the determination of these federal questions could be avoided by requiring plaintiff to seek damages in the state court on some theory other than the Civil Rights Act. But, in any event, it was held in *Monroe v. Pape*, 365 U.S. 167, 183, that the federal remedy provided by the Civil Rights Act is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. "It is no answer," the Supreme Court said, "that the State has a law which if enforced would give relief." See, also, *Cohen v. Norris*, 9 Cir., ... F.2d ...., decided January 30, 1962.

It follows, from what has been said concerning the damage aspect of this case, that abstention could not result in mooting the federal constitutional question concerning the conduct of defendants. Nor would any state court ruling concerning the authority to engage in that conduct be of any assistance to the federal court in deciding the constitutional question. This being the case, abstention would not serve an important countervailing interest. See *Public Utilities Commission of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 463.[6]

We have not overlooked appellee's argument that the damages sought from the eleven state defendants—$100 from each of them—is nominal, and that the principal relief sought is injunctive.

We need not decide whether the $100 sought from each state defendant, if standing alone, should be regarded as a nominal amount. If plaintiff prevails

[6]The district court did not order, and appellees have not suggested, that the case be split, the injunctive feature being dismissed or postponed awaiting a state court adjudication, and the federal court proceeding with the damage feature of the case.

on his damage claim against all of the state defendants, he could recover as much as $1,100. This is a substantial sum. Moreover, while the injunction was sought only against the state defendants, the monetary recovery in the sum of $150,000 sought against all of the remaining defendants cannot be disregarded. Viewing the case as a whole there is no basis for concluding that only nominal damages are sought, or that the principal relief sought is an injunction.

In view of what is said above, it is unnecessary for us to consider whether, if abstention were available here, it was proper to dismiss the action rather than to retain jurisdiction under a stay pending determination of state law questions in state court proceedings, as was required to be done in *Harrison v. N.A.A.C.P., supra.*

Appellees argue, as an additional ground of affirmance, that the complaint does not state a claim upon which relief can be granted. While this was one ground of the motion, it was not a ground relied upon by the district court in dismissing the action.

A complaint is not subject to dismissal upon this ground unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41; *Gruen Watch Co. v. Artists Alliance,* 9 Cir., 191 F.2d 700. We are of the view that, except for the question of whether the complaint adequately alleges that the non-state defendants acted under color of state law, the complaint is sufficient to withstand a motion to dismiss made on the indicated ground. Upon remand the parties will have an opportunity to test the adequacy of the complaint in the respect here reserved,

and plaintiff will have the opportunity to amend the complaint in that respect.

The judgment is reversed and the cause is remanded for further proceedings consistent with this opinion.

Pope, Circuit Judge, concurring:

Notwithstanding I am of the view that the complaint here fails to state a claim, I agree that the case should be remanded for trial and at such trial the facts developed and findings made. In my opinion the issues here are of such vital importance that the principles of sound judicial administration expounded in Kennedy v. Silas Mason Co., 334 U.S. 249, 256,[1] and Poller v. Columbia Broadcasting Co., ... U.S. ...., (Feb. 19, 1962), require that such issues should not be resolved upon a record so limited as this one is. If I were to base a final judgment upon the complaint alone, read in the light of what I know judicially about the State of Nevada, and its laws, regulations and customs relating to its gambling business, I would be obliged to say that plaintiff is entitled to no relief. But I think the

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[1]"The short of the matter is that we have an extremely important question, probably affecting all cost-plus-fixed-fee war contractors and many of their employees immediately, and ultimately affecting by a vast sum the cost of fighting the war. No conclusion in such a case should prudently be rested on an indefinite factual foundation. . . . The hearing of contentions as to disputed facts, the sorting of documents to select relevant provisions, ascertain their ultimate form and meaning in the case, the practical construction put on them by the parties and reduction of the mass of conflicting contentions as to fact and inference from facts, is a task primarily for one judge not for a court of nine.

"We do not hold that in the form the controversy took in the District Court that tribunal lacked power or justification for applying the summary judgment procedure. But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice."

validity of my judgment on that matter can best be tested after all the evidence is in.

Plainiff is not seeking to defend or enforce any of the commonly recognized rights for the protection of which the Fourteenth Amendment was designed. Involved here in not a right to use the highways as in Morf v. Ingels, (three-judge case, Cal.) 14 F. Supp. 922, aff. 300 U.S. 290; or public transportation facilities as in Baldwin v. Morgan, 5 cir., 251 F. 2d 780, 287 F. 2d 750; or to hold a job, as in Truax v. Raich, 239 U.S. 33. What this plaintiff asserts is that he cannot be excluded from a gambling establishment. Making such a claim discloses a failure to appreciate the nature and character of Nevada's peculiar institution,—its legalized gambling.

True the gambling casinos are operated by individuals or corporations under state license, but in a very real sense, and in essence, the State of Nevada itself is in the gambling business, and its continued maintenance of that institution is vital to the State's life and its economy. The people of that State could hardly contemplate its loss; indeed there have been indications that they would be prepared to extend their licensing of activities commonly frowned on elsewhere into other fields. For it would appear, from a recent study in this field, that more than half of the state's total public income comes from taxes attributable to the gambling enterprise.[2]

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[2] "The New Gambling King" by Keith Monroe, Harpers Magazine, January, 1962, Vol. 224, No. 1340: "Sparsely populated states are understandably envious of Nevada (second least populous of all) because its state government takes in $8 million in taxes on gambling operators, plus $10 million in sales taxes plucked mostly from out-of-state seekers of 'Nevada fun.' This

I take judicial notice that Nevada simply cannot afford to lose its gambling business, for its loss would not only affect the tax take,—the loss of employment might be catastrophic,—loss of jobs not only by employees of the gambling casinos themselves but by employees of hotels, restaurants, liquor saloons, and merchandising establishments which would have to fold up when there were no longer gambling crowds to service. As could be expected, the State has gone to great lengths to protect its peculiar institution; and in doing so it has been mindful that he who stirs the devil's broth must needs use a long spoon. For the whole of the State's system of licensing gambling establishments shows its preoccupation with the fear that the wrong kind of people may get control of these enterprises. Thus Nevada statutes provide that it is the policy of the State that all establishments where gambling games are conducted should be licensed and controlled "so as to better protect the public health, safety, morals, good order and general welfare of the inhabitants" of the State, and any license issued to any such establishment is "deemed to be a revocable privilege and no holder thereof shall be deemed to have any vested rights therein or thereunder." Nevada Revised Statutes Sec. 463.130.

The State Gaming Commission and the Control Board are granted "full and absolute power" to deny, suspend or revoke licenses, (Sec. 463.140), and may regulate the games and devices permitted and the "method of operation" of such games. (Sec. 463.150) Ex-

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sum pays more than half of Nevada's expenses. Consequently the tax burden of its 285,000 residents is light. To lighten it further, in 1950 the Nevada legislature passed a law legalizing prostitution, but this was vetoed by the governor."

press regulations as to "method of operation" proscribe ". . . catering to, assisting, employing or associating with, either socially or in business affairs, persons of notorious or unsavory reputation, or who have extensive police records." (Regulation 5.010) Indicating the care taken to screen out questionable characters, Sec. 463.170 provides that no corporation or association may receive a license unless all persons having any direct or indirect interest therein are individually qualified to be licensed.

The opportunities for rich pickings in this sanctuary for gambling would assuredly be tempting to hoodlums and gangsters. At all hazards these enterprises must be preserved for indigenous Nevadans whose law-abiding propensities could be relied upon. Let the gangsters move in from the underworld where they were forced to operate elsewhere, and the resultant crooked games, cheats, frauds, swindles leading inevitably to gangland style kidnapings and killings would mean the end of Nevada's rich gambling take. The good people of the State would not tolerate it, and even if they failed to move, the federal government would be pressured to move in and licensed gambling in Nevada would come to an end with even greater celerity than that which saw the end of polygamy in Utah. The interstate travel aspects of the business would make such federal action simple.[3]

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[3]The extent of the facilities provided to carry trade to the Nevada gambling is almost beyond belief. Every day 88 scheduled airplane flights from other states reach Las Vegas. (This does not include the chartered and other non-scheduled flights such as Hacienda's.) Forty-eight daily scheduled plane flights reach Reno. There are as many scheduled flights from Phoenix to Las Vegas as there are from Phoenix to Los Angeles. A few of these flights are subsidized by the gambling industry.

The hazards incident to the State's system of licensed gambling and its policy of excluding from such gambling persons likely to be connected with crime, corruption and criminal enterprises has been expounded by the Supreme Court of the State. Thus in Nevada Tax Commission v. Hicks, ... Nev. ...., 310 P.2d 852, at 854, the court said: "Throughout this country, then, gambling has necessarily surrounded itself with an aura of crime and corruption. Those in management of this pursuit who have succeeded, have done so not only through a disregard of law, but, in a competitive world, through a superior talent for such disregard and for the corruption of those in public authority.

"For gambling to take its place as a lawful enterprise in Nevada it is not enough that this state has named it

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See Las Vegas Hacienda, Inc. v. Civil Aeronautics Board, 9 cir., (Jan. 16, 1962), ... F. 2d ..... Hacienda flights are advertised as including "free round trip", "de luxe rooms", "two bottles of champagne", etc., in the yellow pages of the San Francisco telephone book. High speed highways carry automobile traffic from Phoenix, Los Angeles, San Francisco, Sacramento, and elsewhere. All this provides for what may be called the "carriage trade".

But aside from this, the author referred to in footnote 2, supra, notes that with the aid of a well known research institute, a large gambling proprietor developed a rewarding source of customers among these Californians who, not owning cars, yet had spending money. Recruited through an advertising campaign in San Francisco, Sacramento, Stockton and 28 other California cities, these generally low income, often elderly, citizens travel in chartered Greyhound buses, ordinarily 20 loads per day, with average load of 30.2 passengers per bus. According to the report, one-fifth of these passengers had made the trip eight times. As soon as the passenger enters the establishment his fare is refunded him. The author suggests that many of these low income customers shortly wind up on the California relief rolls. " 'If we could pay their [Researcher's] fee', said the head of one Salvation Army office, 'we'd be interested to learn just how huge a case load they've added here by helping [the gambling house proprietor] attract people from this town.' "

All that would be required in the way of Congressional action would be an act utilizing the rationale of the Mann Act. Compare Public Law 87-228, Sept. 13, 1961.

lawful. We have but offered it the opportunity for lawful existence. The offer is a risky one, not only for the people of this state, but for the entire nation. Organized crime must not be given refuge here through the legitimatizing of one of its principal sources of income. Nevada gambling, if it is to succeed as a lawful enterprise, must be free from the criminal and corruptive taint acquired by gambling beyond our borders. If this is to be accomplished not only must the operation of gambling be carefully controlled, but the character and background of those who would engage in gambling in this state must be carefully scrutinized."

The court there noted that gambling, carried on elsewhere unlawfully, "tends there to create as well as to attract a criminal element." Undoubtedly, this official consciousness of the hazards of gambling attracting a criminal element is based upon experience and a knowledge of local conditions. It seems fair to assume that the necessity for the State to protect itself from the tendency mentioned has led to its statutory requirement that all persons convicted of felony, in Nevada or elsewhere, must register with and be fingerprinted by the police or sheriff. (In Clark County, which contains Las Vegas, and has a population of 127,016, slightly less than that of Fresno, California, 2560 felons registered with the chief of police, or the sheriff during the period January 1, 1961 to February 21, 1962. The number of such felons who registered previously is not available to me.) The autobiography of one of the best known gambling proprietors in the State describes how, years ago racketeers and mobsters operated a gambling establishment, with cribs on the side, how they destroyed another so-called club, and how the author saved

his own place when he pulled his gun and threatened to shoot seven hoodlums when they came in to wreck his place.[4] When the Nevada authorities contemplated the hazards incident to the operation of gambling, it is not surprising that they made membership on the Gaming Control Board a full time job. They may well consider that things need watching when more than two percent of a gambling community's population are ex-convicts.

I have difficulty taking seriously the claim of $150,000 against the hotel for acts which, according to the complaint, came about through "coercion, intimidation and inducement" by the State officials, "by threat of loss of license, upon the hotels of the State." Jurisdiction here is predicated solely upon the Civil Rights Acts. Sections 1983 and 1985(3) of Title 42, U.S.C. The first of these sections creates no cause of action against a private individual.[5] The second one (1985(3)), is the one which provides: "If two or more persons in any State or Territory conspire . . . for the purpose of depriving . . . any person . . . . of the equal protection of the laws", etc. Liability under this section can arise only where the wrongful acts are done under color of state authority. Collins v. Hardyman, 341 U.S. 651.[6] But if one or more of the defendants conspiring

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[4]Harold S. Smith, Sr.: "I Want To Quit Winners" (Prentice-Hall, 1961) pp. 165, 167.

[5]Monroe v. Pape, 365 U.S. 167, 175-6: "While one scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." See also, Kenney v. Hatfield, 132 F. Supp. 814, affirmed 6 cir., 232 F. 2d 288, 289-90; Watkins v. Oaklawn Jockey Club, 8 cir., 183 F. 2d 440, 443; Shemaitis v. Froemke, 7 cir., 189 F. 2d 963; Bottone v. Lindsley, 10 cir., 170 F. 2d 705, 706.

are state officers, the non-officer defendants may be held. Hoffman v. Halden, 9 cir., 268 F. 2d 280, 298.

The reason I cannot take this $150,000 claim seriously is that I cannot perceive how these private defendants could be said to have conspired to deny plaintiff equal protection of the law while acting under "coercion, intimidation, and inducement." On the trial it will not take the judge long to decide whether these damages claimed against the private defendants have any basis.

Another aspect of the complaint presents allegations which I think any person familiar with the State of Nevada would know could not be true. This is the claim that by reason of the acts of the defendants "plaintiff cannot stay at a hotel in the State of Nevada", and that defendants undertook to "bar plaintiff from the State of Nevada".

The official action with and concerning the "black book" was not directed to hotels as such. It was directed solely to the purpose of preventing the presence of certain persons "in any licensed establishment". The most that plaintiff can claim is that he was excluded from a gambling establishment. No other interpretation could possibly be placed upon the black book and the statements which accompanied it.[7]

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[6]This case was brought under what is now Title 42, Sec. 1958(3). The decision reversed this court which had reversed Judge Yankwich, 185 F. 2d 308. Judge Yankwich, discussing the action, had stated (Hardyman v. Collins, 80 F. Supp. 501, 510): "No cases exist, where an action either civil or criminal has been maintained against private persons who interfered with such rights."

[7]Plaintiff tries to suggest that if the Desert Inn is prohibited from receiving him, then he cannot enter or stay at any hotel; that this means excluding him from the State. It is true that many Nevada hotels, like the Desert Inn, have gambling casinos. Whether, as a matter of Nevada law, they would be regarded

This brings me to the question whether the State of Nevada may validly and constitutionally exclude from the premises where gambling is carried on a person in the position of this plaintiff.

Plaintiff's rights here involved are those which he has by virtue of the Fourteenth Amendment which prohibits the state to deprive any person of life, liberty or property without due process of law and to deny to any person within its jurisdiction the equal protection of the law. It is too elementary to require extended exposition that much of the action taken by a state which is in the exercise of its police power operates to place limitations upon the use of property, the freedom of action of individuals, and the exercise of rights which the individual may claim in the absence of such legislation.

As stated in Noble State Bank v. Haskell, 219 U.S. 104, 111: "It may be said in a general way that the police power extends to all the great public needs . . . it may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." And in the exercise of this police power the state may make reasonable classifications of individuals and property so that some are treated differently from others providing of course the state authorities find substantial basis for such classification. Kotch v. Pilot Comm'rs., 330 U.S. 552, 556: "A law which affects the activities of some groups differently from the way in which it affects the ac-

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as innkeepers, with casinos, or as casinos with room facilities attached, I would not know. But I do know that Nevada is plentifully supplied with convenient and even luxurious motels, many of them having no gambling facilities. That plaintiff could find no place to eat or sleep appears incredible.

tivities of other groups is not necessarily banned by the Fourteenth Amendment. . . . Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be."

In determining what is state policy, in deciding what purposes of government are to be served by state limitations upon individuals and property, when the state has spoken that is generally the end of the matter because it is within the competence of each state to define its own public purposes. Berman v. Parker, 348 U.S. 26, 32: "Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation, whether it be Congress legislating concerning the District of Columbia . . . or the States legislating concerning local affairs."

We note here that the exercise of power on behalf of the State of Nevada was accomplished by an act or acts of its Gaming Commission or its Gaming Board with or without the assistance of the Governor. But in a federal court it is of no consequence whether the acts were performed by executive or administrative officers purportedly exercising delegated powers or whether they were done by specific enactments of the legislature itself. Whether the delegation here was proper or not does not concern us;—it is not a federal question. Gundling v. Chicago, 177 U.S. 183, 188; Douglas v. Noble, 261 U.S. 165, 170. See also Lieberman v. Van De Carr, 199 U.S. 552, 562, 563.

Almost without number are the decisions of the courts holding that the Fourteenth Amendment does

not prohibit governmental regulation for the public welfare. "Laws passed for the suppression of immorality, in the interest of health, to secure fair trade practices, and to safeguard the interests of depositors in banks, have been found consistent with due process." Nebbia v. New York, 291 U.S. 502, 526, citing in footnotes long lists of decisions of the Court illustrating that proposition. All that is required is that the state's restrictions bear "such a relation to a legitimate object of legislation as to be made the basis of a permitted classification." Clarke v. Deckebach, 274 U.S. 392, 396. "It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. . . . With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system." Purity Extract Co. v. Lynch, 226 U.S. 192, 201.[8]

It follows from these considerations that where the anticipated evils, sought to be prevented or restricted, are particularly serious, or where extreme harm may be

[8]Olsen v. Nebraska, 313 U.S. 236, 246: "We are not concerned, however, with the wisdom, need, or appropriateness of the legislation. Differences of opinion on that score suggest a choice which 'should be left where . . . it was left by the Constitution—to the States and to Congress.'" See in accord, West Coast Hotel Co. v. Parrish. 300 U.S. 379, 399; Clark v. Deckebach, supra.

anticipated, the remedies to be applied may be more drastic remedies as necessary to protect the state against the anticipated harm. The more serious the threat to the state's welfare, the more drastic the remedy which may be applied.[9]

In the case before us the problem of excluding hoodlums from gambling places in the State of Nevada can well be regarded by the State authorities as a matter almost of life or death. It would be altogether out of place for any court, and particularly a federal court, to say that the State of Nevada could not reasonably anticipate serious and adverse consequences to its peculiar institution if the criminal element is permitted to participate in gambling in its casinos.

When this case is tried, if the legislative facts properly to be considered in passing upon the constitutional validity of the orders here complained of, including some of the matters of which I have here assumed to take judicial notice, are developed for the benefit of the court, I think that the court will have no difficulty in finding that the Gaming Board and the Gaming Commission would apprehend the serious possibility of persons of that character carrying into the establishment loaded dice, marked cards, and other means for cheat-

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[9]Illustrations of drastic state action are Miller v. Schoene, 276 U.S. 272 (compelled cutting of all red cedar trees); Buck v. Bell, 274 U.S. 200 (compulsory sexual sterilzation of persons with hereditary insanity); Hadacheck v. Los Angeles, 239 U.S. 394 (destruction of large values of brick clay deposits through municipal zoning); Sentell v. New Orleans &c. Railroad Co., 166 U.S. 698, 705, refers to the holding that "a house may be pulled down or blown up by the public authorities is necessary to avert or stay a general conflagration", and to "the power to kill disabled cattle, to destroy obscene books or pictures, or gambling instruments."

ing or otherwise disrupting the orderly conduct of the licensed gambling. The Board's finding that the mere entry of such a person threatened harm, could not be questioned by the court.[10]

What this case will boil down to in the end is the question whether the State of Nevada may validly exclude convicted felons and ex-convicts from gambling establishments. Plaintiff's complaint states that the basis for his designation as "undesirable" is "the claimed criminal record of plaintiff." The complaint discloses that he had been previously convicted of a felony. It seems too plain to require argument, that a state may validly refuse the privilege of gambling to such a person.

Gambling or being in or about a gambling establishment is a mere matter of governmental favor; it has none of the aspects of property or other private right. In that respect the gambling casino or any other establishment would stand on no higher plane than that of a business of dealing in liquor for non-beverage purposes which was discussed in Ma-King v. Blair, 271 U.S. 479. In that case the governmental official refused a permit to operate a plant for denaturing alcohol although the Commission had power to grant such a per-

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[10]The complaint contains a paragraph alleging that on the evening when plaintiff was excluded from the gambling premises (which plaintiff insists on referring to as "hotel"), the officers confiscated cards and dice. The complaint alleges that this was done to harass and intimidate the hotel operators. If the cards and dice were confiscated, it is a more probable inference that this was done to safeguard against the possible consequences of the plaintiff having been on the gambling premises.

For a reference to a celebrated instance of the development of legislative facts for the court, see Muller v. Oregon, 208 U.S. 412, 419.

mit. The Supreme Court quoted with approval language of the Court of Appeals as follows: "The holder of such a permit is entrusted by the government with a power which subjects him to the approaches and bribes of lawbreakers and where, as in this case, the business associations of applicants have been with men whose conduct has already invited prohibition prosecutions against them, it goes without saying that the commissioner would have been derelict in duty in granting them a permit." Such a conclusion is so rational and so compelling that it was not even suggested in that case that the complaining parties had been denied any constitutional right.

The complaint is made that the black book was made up without notice or hearing to the persons listed therein. It is unnecessary to consider here whether some of the persons whose names appear in that black book may have been placed there merely because the control board considered them to be persons of bad reputation or known hoodlums or associates of such persons. The decision of this case does not require an inquiry as to whether some such persons might be entitled to notice and hearing before they were placed in an excluded category. Possibly the question of identity, reputation, association with others, would be an appropriate matter for inquiry at a hearing. But plaintiff must stand upon his own rights; he cannot attack the constitutionality of the State's action as it affects persons other than himself. "Ordinarily, one may not claim standing in

this Court to vindicate the constitutional rights to some third party." Barrows v. Jackson, 346 U.S. 249, 255. See, in accord Clark v. Kansas City, 176 U.S. 114, 118; Atkins v. Kingsbury, 247 U.S. 484, 489.[11]

The placing of this plaintiff's name in the black book list of persons not permitted to enter gambling establishments cannot be questioned on any ground that I can perceive for plaintiff cannot with reason attack a determination that a person convicted of a felony is not permitted to enter a gambling establishment. He is not in a position to contend that he is not such a person for his complaint admits that he is. It cannot be said that in this situation where an admitted ex-convict is about to make himself at home in a gambling establishment, that nothing can be done about excluding him until after service of notice and time fixed for hearing.

It is erroneous to assume that a state may never take action without notice and hearing to persons to be affected. Laws are regularly passed, regulations adopted

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[11]Plaintiff does not base any claims upon the fact that the "black book" lists but a few persons. I think that circumstance cannot aid him. As stated in Buck v. Bell, supra, (274 U.S. at 208; "But, it is said, however, it might be if this reasoning were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside. It is the usual last resort of constitutional arguments to point out shortcomings of this sort. But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow. Of course so far as the operations enable those who otherwise must be kept confined to be returned to the world, and thus open the asylum to others, the equality aimed at will be more nearly reached."

without a hearing.[12] In view of the situation of peril which, as we have noted, always surrounds gambling in Nevada, the trial court may well find that plaintiff's entry upon the gambling premises would present an emergency comparable to that presented by an animal running at large while suspected of being afflicted with the foot and mouth disease.

(Endorsed) Opinion and Concurring Opinion Filed Mar. 7, 1962.

Frank H. Schmid, Clerk.

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[12]Suppose a state highway commission causes to be placed on the highway a sign saying: "Tractors with lugs not permitted on the road." As a farmer tries to drive his tractor with lugs on the highway, a patrol officer stops him and prevents his passage. No one would suggest that this action was unlawful because no hearing was had. I find difficulty in concluding that keeping a felon from entering a gambling establishment presents any different situation.

APPENDIX C.

Memorandum Decision.

In the United States District Court, District of Nevada.

John Marshall, Plaintiff, vs. Grant Sawyer, as Governor of the State of Nevada; Nevada Gaming Control Board, Ray J. Abbaticchio, Jr., as Chairman, George Ullom and Ned A. Turner, as Members of the Nevada Gaming Control Board; Nevada Gaming Commission, Milton W. Keefer, as Chairman, Norman D. Brown, Bert Goldwater, James W. Hotchkiss and F. E. Walters, as Members of the Nevada Gaming Commission; D. I. Operating Co., a Nevada Corporation; Allen Roen, Ruby Colod; Don Borax; Arthur Ostap; J. G. Murray, Defendants. Civil No. 360.

Filed: Sept. 2, 1964.

This case was tried before the court sitting without a jury, and was submitted for decision on written argument.

The plaintiff was represented by W. Albert Stewart, Jr., William B. Beirne and the firm of A. L. Wirin and Fred Okrand, with Fred Okrand appearing.

The State defendants were represented by Harvey Dickerson, Attorney General of the State of Nevada, with Special Deputy Attorney Generals Norman H. Samuelson and John C. Bartlett, appearing.

The non-State defendants were represented by J. A. Donnelley and by Morse and Graves, with Madison B. Graves, appearing.

PARTIES

The plaintiff is John Marshall, a citizen of the United States and a resident of the State of Illinois.

The first group of defendants is composed of Grant Sawyer, as Governor of the State of Nevada; the Nevada Gaming Control Board, and its members, Ray J. Abbaticchio, Jr., George Ullom and Ned A. Turner; the Nevada Gaming Commission, and its members, Milton W. Keefer, Norman D. Brown, Bert Goldwater, James W. Hotchkiss and F. E. Walters, which group hereinafter will be referred to as the State defendants.

The second group of defendants is composed of the D. I. Operating Co., a Nevada Corporation, which operates the Desert Inn Hotel in Las Vegas, Nevada; and five of its employees, Allard Roen, sued as Allen Roen; Ruby Kolod, sued as Ruby Colod; Don Borax, Arthur Ostap and J. G. Murray, which group hereinafter will be referred to as the non-State defendants.

All defendants are residents of the State of Nevada.

JURISDICTION

This is a civil action for injunction and damages. Jurisdiction of this court is provided by 29 U.S.C.A. 1332(a)(1), Diversity of Citizenship, and 28 U.S.C.A. 1343(3) which provides:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States

or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;"

Counsel for the plaintiff stated at the outset of the trial that Title 42 U.S.C.A. 1985(3) was not applicable, although alleged in the complaint, as plaintiff had not alleged a conspiracy between the State and non-State defendants but that plaintiff was relying on Title 42 U.S.C.A. 1983 which reads as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

FACTS OF THE CASE

The incident of which plaintiff complains occurred at about 10:00 P.M. on October 28, 1960. Plaintiff entered the Desert Inn Hotel in Las Vegas, Nevada, which has a gaming license. He sat in a booth in the bar and was served one drink. He was approximately 10 to 12 feet from the gaming area and could see the gaming by looking over the back of the booth which was 4 to 5 feet high.

Under instructions from defendant Don Borax, Chief Security Officer of the Desert Inn, defendant J. G. Murray, a Security Officer employed by the Desert Inn, asked plaintiff to leave the premises. Plain-

tiff refused and ordered another drink, but the waitress refused to serve him.

Mr. Allard Roen and Mr. Ruby Kolod, stockholders and managing officials of defendant, D. I. Operating Co., Inc., requested plaintiff to leave the premises. Plaintiff then moved from the booth to the bar, but the bartender walked away from him. Plaintiff then asked for and received the names of the persons who had asked him to leave or had refused him service for the purpose of filing this lawsuit. Plaintiff also asked for and received assurance that no physicial force would be used upon him, and then walked out of the Desert Inn.

The same night plaintiff entered other hotels in Las Vegas, Nevada, and was asked to leave by the management; however, he was not asked to leave any hotel that was not licensed for gaming.

The non-State defendants requested plaintiff to leave solely because they had been requested by the Gaming Control Board not to cater to him.

Some of the underlying facts which led up to the incident of which plaintiff here complains should be briefly mentioned. In 1931 the legislature of the State of Nevada legalized gambling. In 1959, by amendment to Chapter 463 N.R.S., the legislature created the Nevada Gaming Commission to supervise the gaming industry.

Defendant, Grant Sawyer, as Governor of the State of Nevada, appointed defendants Milton W. Keefer, Norman D. Brown, Bert Goldwater, James W. Hotchkiss and F. E. Walters to the Nevada Gaming Commission, and the Commission employed Ray J. Abbatic-

chio, Jr., George Ullom and Ned A. Turner as members of the Nevada Gaming Control Board to investigate, audit and enforce the regulations of the Commission.

The Commission, pursuant to authority delegated by the legislature, passed Regulation 5.010 which states in part as follows:

"1. It is the policy of the commission and the board to require that all establishments wherein gaming is conducted in this state be operated in a manner suitable to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada.

2. Responsibility for the employment and maintenance of suitable methods of operation rests with the licensee, and willful or persistent use or toleration of methods of operation deemed unsuitable will constitute grounds for license revocation.

3. The commission and the board deem that any activity on the part of a licensee, his agents or employees which is inimicable to the public health, safety, morals, good order and general welfare of the people of the State of Nevada or which would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry is an unsuitable manner of operation. Without limiting the generality of the foregoing, the following acts or omissions may be deemed unsuitable manners of operation:

(e) Catering to, assisting, employing or associating with, either socially or in business affairs, persons of notorious or unsavory reputation or who have extensive public records, or persons

who have defied congressional investigative committees or other officially constituted bodies acting on behalf of the United States or any state, or persons who are associated with or support subversive movements."

To aid the enforcement of this regulation and to notify the major casinos which people were considered by the Commission to be "persons of notorious or unsavory reputation or who have extensive police records," the Gaming Control Board, without notice to plaintiff, compiled and distributed the "Black Book" (Exh. #1) and a letter (Exh. #3) to the major casinos.

The Black Book contained the name, photograph, description and, where available, the F.B.I. and C.I.I. numbers of eleven persons, including the plaintiff.

Exhibit #3 notified the holders of gaining licenses that they were not to cater to the persons in the Black Book or anyone of equivalent character, and that the cooperation of licensees in preventing the presence of such persons in any licensed establishment would be appreciated. It also indicated that if cooperation was not forthcoming there would be a possibility of license revocation for "unsuitable manner of operations."

It is conceded by the State defendants that their purpose was to exclude the persons in the Black Book from the entire premises licensed for gaming, including the hotel, golf course, swimming pool, etc., and not merely the gaming area.

To establish a claim for damages under the Civil Rights Act plaintiff must establish that the conduct complained of was engaged in under color of State

law and that such conduct subjected the plaintiff to the deprivation of rights, privileges or immunities secured by the Constitution of the United States. [*Marshall v. Sawyer*, 301 F.2d 639]. The State defendants' conduct was engaged in under color of State law as they were clothed with the authority of the State of Nevada and were purporting to act thereunder.

Counsel for the non-State defendants rightly points out that the Civil Rights Act provides redress for state action and not for private conduct even if discriminatory or wrongful. However, state action refers to exertions of State power in all forms. [*Shelley v. Kraemer*, 334 U.S. 1].

This principle was stated by the Supreme Court in *Burton v. Wilmington Parking Auth.*, 365 U.S. 715.

> ". . . private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."

Here the non-State defendants acted solely because of the persuasion of the State defendants, thus the State has become involved in the action of the non-State defendants to the extent that their action is under color of State law as much as if the State defendants took the action themselves.

This brings the court to the question of whether plaintiff was deprived of rights, privileges and immunities secured by the Constitution of the United States. The only rights plaintiff claims to have been deprived of are alleged in Paragraph IX of the complaint to be the right to public accommodation and to

freedom of movement. In argument plaintiff's counsel have included the right "to be let alone," "the right of privacy" and "to get a cup of coffee" as part of plaintiff's right to freedom of movement, and urges that these rights are protected by the Fourth and Fourteenth Amendments to the Constitution of the United States. However, the testimony in this case has established that plaintiff was not deprived of public accommodation or freedom of movement except on premises of establishments licensed for gambling. Therefore, the real issue in this case is whether the State of Nevada may validly and constitutionally exclude from the premises licensed for gaming a person in the position of this plaintiff.

The Fourth Amendment states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Plaintiff's counsel urges that only because plaintiff submitted to ouster was actual physical force not used and that the threat of force was present. However, plaintiff testified that he was never threatened with physical force, but to the contrary, was told that no one was going to do him any physical harm.

Under the facts of this case plaintiff has not been subjected to an unreasonable search or seizure in the Fourth Amendment sense and has not been deprived of any right guaranteed by the Fourth Amendment to the Constitution of the United States.

Section I of the Fourteenth Amendment to the Constitution of the United States provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The conduct of defendants limited plaintiff's right to public [MDC] accommodation and freedom of movement to premises not licensed for gaming. However, the Fourteenth Amendment does not prohibit governmental regulation for the public welfare, even where such regulations place limitations upon the use of property, the freedom of action of individuals, and the exercise of rights which the individual may claim in the absence of such regulation.

Here, the State of Nevada has provided for regulation of gaming establishments so as to better protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada, [Section 463.130 Nevada Revised Statutes.], including regulation 5.010 which in effect provides that catering to persons of notorious or unsavory reputation or who have extensive police records is inimicable to the public health, safety, morals, good order and general welfare of the people of the State of Nevada.

As was said in *Kotch v. Pilot Comm'rs.*, 330 U.S. 552, "A law which affects the activities of some groups

differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. . . . Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be."

Here, the State of Nevada has classified individuals of notorious and unsavory reputation or extensive police records so that they are treated differently from others. This is a reasonable classification in relation to the legitimate object of protecting the public health, safety, morals and general welfare of the inhabitants of the State of Nevada, and protecting the gaming industry itself. This is particularly true in light of the uncontradicted evidence that the gaming industry is vital to the economy of the State of Nevada as approximately 30% of the general fund comes directly from gaming taxes, and in 1962, 35,474 persons, or approximately 10% of the total population of the State, were employed in gaming establishments.

That plaintiff is properly included in this reasonable classification is substantiated by the following evidence.

Plaintiff, in his complaint, admits six convictions, including a felony conviction, and testified that he had been arrested or questioned by the police over a dozen times for crimes including murder, for which he was not convicted.

The evidence shows that plaintiff has the reputation in Chicago of using "muscle tactics" such as threats, extortion, bombings and murder. On January 26, 1953, plaintiff was reported to the Chicago Crime Commission to have been arrested eighteen times from 1929 to 1951, and was reputed to be a bank robber, ex-alki peddler and current bookmaker.

The Gaming Control Board had this information at the time of preparing the Black Book, as well as a report on organized crime in California, the portion concerning plaintiff which states:

> "Reported to be top Lieutenant in Tony Accardo's Syndicate, the successor of the old Capone gang. In December 1957, when Cohen and Fred Sica attempted to muscle a gambler into paying a bookmaking debt, the victim phoned Caifano* in Chicago. The matter was quickly settled. Caifano is a suspected underworld muscle and triggerman. He is high up in the numbers racket. He has a record of arrests, including the serving of terms for both burglary and bank robbery."

Plaintiff testified that he had never been employed steadily, and from 1937 to 1951 illegally booked bets on horses in Chicago, Illinois. That since 1951 he had earned from $12,000 to $18,000 per year betting on sporting events. Plaintiff admitted his police record which is extensive and offered no evidence of good reputation.

Therefore, the State of Nevada may exclude plaintiff from premises licensed for gaming, and the conduct of the defendants did not deprive plaintiff of life, liberty or property without due process of law, or the equal protection of the law as provided by the Fourteenth Amendment of the Constitution of the United States.

Since the conduct complained of is a valid exercise of the police power reserved to the States by the Tenth

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*Plaintiff was born Marchello Caifano in Uew York Citv, and legally changed his name to John Michael Marshall in 1955 at Clark County, Nevada.

Amendment to the Constitution of the United States, the exclusion of the plaintiff from the entire licensed premises and not just the gaming area is justified to make effective enforcement possible, and the non-State defendants are not liable to plaintiff for refusing him service.

The State may exercise its police power without notice and hearing to persons of the class to be affected, so defendants' conduct does not violate plaintiff's right of due process.

Plaintiff has asked for substantial damages, alleging humiliation, embarrassment and the loss of rights previously discussed.

That defendants acted without malice is conceded by the plaintiff, and the evidence shows no actual monetary loss; so, even if liability had been established, damages would be nominal, $1.00 from each defendant, except George Ullom who had resigned from the Gaming Control Board prior to October 28, 1960, and Arthur Ostap who was not identified as participating in the incident.

Judgment is granted to all defendants as prayed plus costs of suit.

Counsel for defendants is to prepare Findings of Fact, Conclusions of Law and Judgment in accordance with Local Rules of this court.

Dated: September 24, 1964.

M. D. CROCKER
United States District Judge

APPENDIX D.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

John Marshall, Appellant, vs. Grant Sawyer, as Governor of the State of Nevada; Nevada Gaming Control Board; Ray J. Abbaticchio, Jr., as Chairman, George Ullom and Ned A. Turner, as Members of the Nevada Gaming Control Board; Nevada Gaming Commission, Milton W. Keefer, as Chairman, Norman D. Brown, Bert Goldwater, James W. Hotchkiss and F. E. Walters, as Members of the Nevada Gaming Commission; D. I. Operating Co., a Nevada Corporation, Allard Roen; Ruby Colod; Don Borax; Arthur Ostap; J. G. Murray, Appellees. No. 20,145.

[August 10, 1966]

Appeal from the United States District Court for the District of Nevada.

Before: POPE, HAMLEY and KOELSCH, Circuit Judges.

HAMLEY, Circuit Judge:

John Marshall brought this civil rights action to recover damages and obtain injunctive relief.[1] He claimed that he was the victim of an unconstitutional agreement and policy to discriminate against him and to bar him from the State of Nevada, as an "undesirable" person. Marshall named, as the so-called state defendants, the Governor of Nevada, State Gaming Control Board of Nevada, Nevada Gaming Commission,

[1]The provisions of the Civil Rights Act particularly relied upon are 28 U.S.C. § 1343(1), (3) and (4) (1964), and Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983 (1964).

and the members of the board and commission. As the so-called non-state defendants, he named D. I. Operating Company, a Nevada corporation which operates the Desert Inn Hotel, and five employees of that company.

The district court dismissed the action on the ground that the federal court should abstain and remit Marshall to his state court remedies. We reversed and remanded the cause to the district court for further proceedings. *Marshall v. Sawyer,* 9 Cir., 301 F.2d 639. After a non-jury trial, judgment was entered for defendants. Marshall appeals.

The board and commission named above regulate and control legalized gambling in Nevada pursuant to the Nevada Gaming Control Act (Act), Chapter 463 of the Nevada Revised Statutes. On February 20, 1960, the commission adopted Regulation 5.010. Paragraph 1 of this regulation provides that all "establishments wherein gaming is conducted" shall be operated in a manner "suitable to protect the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada." Paragraph 3 of the regulation provides, in part, that "(c)atering to, assisting, employing or associating with, either socially or in business affairs, persons of notorious or unsavory reputation or who have extensive police records . . ." may be deemed ". . . unsuitable manners of operation. . . ."

To implement this part of Regulation 5.010, the board and commission, in February and early March, 1960, caused to be complied a brochure commonly referred to as the black book. This document contains the name, photograph, description and other identifying data of eleven men considered by these agencies to be persons within the classes referred to in Regulation

5.010(3). Marshall is one of the persons so identified in the black book.

This brochure, together with a letter dated March 29, 1960, signed by the chairman of the board, was handed to representatives of the thirteen major casino operators in the Las Vegas area, and to representatives of other large casinos in other parts of the state. Board officials requested these representatives to cooperate with the board in the program manifested by Regulatio 5.010, the black book, and the letter of March 29, 1960.[2]

Marshall had lived in Las Vegas for about four years during the 1950's. He engaged in business there and bought Nevada land, some of which he still owns. He has had occasion to return to Las Vegas on business several times; some of these trips were concerned with litigation over his property. In October, 1960, Marshall came to Las Vegas on business and registered at the Tropicana Hotel. He was immediately placed under surveillance by agents of the board. While he was there, representatives of that hotel told him he was in the black book and asked him to leave, stating that if he did not the hotel would lose its gambling license. Marshall left. That week whenever

[2]Board officials suggested various courses of action the licensees could take in providing such cooperation. Among these were the following:

> ". . . if detected while attempting to register at one of the major hotels included in this program, they might be told no rooms were available or should they succeed in registering under an assumed name or before their true identity were known to the management, they might be requested to leave and should they refuse, they might thereafter receive such poor service with respect to making up their rooms, the use of the telephone and in the coffee shop, showrom or bar, that they would shortly check out, it being recognized that as a matter of general practice, the gaming casinos themselves reserve the right to decline to permit certain individuals to gamble."

Marshall went to a Las Vegas establishment that operated a casino, he was asked to leave because of pressure from the state defendants.[3]

At approximately 10:00 p.m. on the night of October 28, 1960, Marshall entered the premises of the Desert Inn Hotel. He occupied a seat in a booth in the bar some ten to twelve feet from the gaming area. From this seat he could observe gaming activity by looking over the back of the booth in which he was seated. Shortly thereafter, Don Borax and J. G. Murray, security officers of Desert Inn Hotel, requested Marshall to leave. He refused to do so and ordered another drink. A waitress from whom the drink was ordered refused to serve him. At this time Borax, Murray and the waitress were acting in accordance with instructions given to them by officers and agents of D. I. Operating Company.

Upon the refusal of Marshall to leave, Roen and Ruby Colod, managing officers of the company, again requested him to leave. Marshall once more refused to leave but moved directly to the bar, where he ordered another drink. The bartender moved away from Marshall and did not serve him. Marshall then asked for and received the names of the persons who had asked him to leave and who had refused him service, stating that it was for the purpose of this lawsuit.

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[3]One method pursued by the state defendants in exerting pressure on licensing establishments was to send in teams of state agents to examine the dice and cards at the casinos which had catered to Marshall. This was done twice during the third week of October, 1960. Allard Roen, one of the managing officers of the Desert Inn testified that Chairman Abbaticchio told him the board was going to continue this type of procedure ". . . as long as people in the black book were being admitted to the hotels."

Marshall was assured at the time that no physical force would be used to remove him from the premises, and that he would not be physically ejected. He thereupon left the Desert Inn Hotel. No physical force nor violence was visited upon him on the occasion just described. The non-state defendants asked Marshall to leave the premises of the Desert Inn Hotel solely because they had been requested by the board, its agents, representatives and employees, not to cater to Marshall.

Marshall was not excluded from any establishment serving food or drinks, or from any place offering rooms, or from any place of amusement in the State of Nevada except ones in which there were major casinos licensed by the commission. None of the actions of the defendants, as described above, was based upon considerations of color, race, creed, religion or national origin.

The district court found that Marshall's name was included in the black book because he had an extensive police record. This record, the court found, spanned the period from April, 1929, through August, 1952, and involved six convictions, including one for a felony. The court found that these convictions were obtained under various names by which Marshall had been known, including the names Joe Russo, Frank Roberto, Marshall Cafano, Joseph Rinaldi and George Marshall.

The court further found that Marshall had been questioned at least a dozen times in connection with the investigation of crimes, including murder. Additionally, the court found that Marshall had a reputation in Chicago, Illinois, of using "muscle techniques such as threats, extortions, bombings and murder." On or about January 26, 1953, the court found, Mar-

shall was reported by the Chicago Crime Commission to have been arrested eighteen times between the years 1929 and 1951, and as having a reputation of being a bank robber, ex-peddler of alcohol and a current bookmaker.

The court found that at the time the black book was compiled the board was in possession of the information concerning Marshall, referred to above, and in possession of a report on organized crime in the State of California, a portion of which is quoted in the margin.[4] Marshall admitted that between the years 1937 and 1951 he was engaged in booking illegal bets on horse races in Chicago. At the trial he offered no evidence bearing upon his reputation, and admitted his police record, which record is also set out in his own complaint instituting this action.

The district court found that the specific purpose of the state defendants in compiling the black book was to exclude the persons therein named, or any other person of similar character and qualifications, from the entire premises licensed for gaming. This would include not only the gaming area, but also the hotel, bars, restaurants, amusement areas, golf course, swimming pool and all other parts of the operation.

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[4]Concerning Marshall, the report states:

"Reported to be top Lieutenant in Tony Accardo's Syndicate, the successor of the old Capone gang. In December 1957, when Cohen and Fred Sica attempted to muscle a gambler into paying a bookmaking debt, the victim phoned Caifano* in Chicago. The matter was quickly settled. Caifano is a suspected underworld muscle and triggerman. He is high up in the numbers racket. He has a record of arrests, including the serving of terms for both burglary and bank robbery. (*Plaintiff was born Marchello Caifano in New York City, and legally changed his name to John Michael Marshall in 1955 at Clark County, Nevada.)"

The district court further found that the state defendants acted reasonably in classifying Marshall as a person who should be excluded from gaming establishments in the State of Nevada. The court also found that the action of the state defendants in causing Marshall to be excluded from the entire premises where gaming was permitted and licensed, and not merely from the gaming area of such premises, was necessary in order to achieve effective enforcement of the Act and of the regulations of the commission and board. Additionally, the court found, Marshall suffered no pecuniary damage whatsoever by reason of his inability to remain in any hotel, bar or restaurant in Nevada where there was licensed gaming.

On the basis of these and other findings, the district court concluded that none of the defendants violated any of Marshall's constitutional rights, and that he was entitled to no relief in this action. Judgment for defendants was thereupon entered and this appeal followed.

Marshall argues that the finding of fact that defendants acted reasonably in excluding him from the entire premises of establishments where gambling casinos were in operation, and that such was necessary in order to achieve effective enforcement of the Act and Regulation 5.010, is clearly erroneous. He asserts that defendants made no showing of what the evil is that would result from his law-abiding presence in the non-gaming portion of the premises.

Regulation 5.010 in effect warns each gaming licensee not to cater, in any part of the licensee's establishment, to "persons of notorious or unsavory reputation or who have extensive police records." This regu-

lation therefore represents an administrative determination, made in the course of rule-making, that effective enforcement of the Act requires that such persons be excluded not only from the gaming area, but also any other part of the establishment.

Marshall has not attacked the validity of this regulation.[5] It follows that there was no proper question of fact before the trial court as to whether exclusion of Marshall (assuming him to be a person of the kind described) from the entire establishment of the Desert Inn Hotel or any other major casino establishment, was necessary to achieve effective enforcement. The unchallenged regulation, manifesting an administrative determination to that effect, settled that question for the purposes of this case. No such question of fact being properly before the court, we need not decide whether the challenged finding of fact concerning that question is clearly erroneous.[6]

Marshall contends that, under the Supreme Court "sit-in" decisions,[7] he could not have been forcibly removed from the Desert Inn Hotel as a trespasser while

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[5]Had he done so, it would have been necessary to convene a three-judge court pursuant to 28 U.S.C. §§ 2281, 2284 (1964), since Regulation 5.010 constitutes an administrative order of general application representing considered state policy. See *Marshall v. Sawyer*, 9 Cir., 301 F.2d 639, 644-645.

[6]For the same reason, Marshall's insistence, at the trial and here, that this is not a "gambling case" because he was not endeavoring to enter the gaming area of the Desert Inn Hotel or any like establishment, is without relevance.

[7]The decisions cited are: *Bell v. Maryland*, 378 U.S. 226, 286, 293-294, 304, 346, concurring opinion of Justice Goldberg, dissenting opinion of Justice Black; *Avent v. North Carolina*, 373 U.S. 375; *Gober v. City of Birmingham*, 373 U.S. 374; *Lombard v. Louisiana*, 373 U.S. 267; *Peterson v. City of Greenville*, 373 U.S. 244; *Garner v. Louisiana*, 368 U.S. 157; and *Boynton v. Virginia*, 364 U.S. 454.

peacefully requesting service therein and that, therefore, coercing him to leave in the manner described above violated his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

This argument is based on the proposition that all citizens whose conduct is peaceful and orderly have a constitutional right to enjoy private businesses offering public accommodations, free from state interference. But the cases cited do not establish such a broad and unrestricted right. The pronouncements of the Supreme Court in the "sit-in" decisions were directed at discrimination based solely on race; these cases are hardly analogous to the present situation which involves refusal of service on the basis of a criminal record in an establishment which also offers gambling activity.

Marshall has not attacked the validity of Regulation 5.010 which supported the defendants' action. For the purposes of this case, that regulation must therefore be considered a valid restriction on the use of gaming facilities by certain classes of individuals. Similarly, the determination inherent in unchallenged Regulation 5.010, that effective regulation requires the exclusion of these individuals from the entire premises of the establishments offering gaming must also be considered valid. The presence of this regulation and Marshall's failure to contest it forecloses his argument based on a claimed right to unrestricted use of private businesses offering public accommodations.

Viewed in this light, the Supreme Court decisions relied upon by Marshall are inapposite, and his argument based on those decisions is without merit.

Marshall asserts that the effect of defendants' conduct was, arbitrarily and without warrant, to restrict,

impede and impair his right to move in and about the State of Nevada, thereby depriving him of due process, in violation of the Fourteenth Amendment.

The basic premise of this argument is that Marshall has been restricted and impeded in moving in and about the state "arbitrarily and without warrant." Unchallenged Regulation 5.010 establishes that such restriction as has been placed upon Marshall is not arbitrary and without warrant. This being so, his exclusion from fifteen or twenty Nevada gambling establishments has not restricted and impeded his movements in that state in any sense cognizable under the Fourteenth Amendment.

Marshall contends that in listing his name in the black book and accompanying letter, without first affording him an administrative hearing, the state defendants violated Article I, § 10, cl. 1 of the Constitution, which forbids the states from passing any bill of attainder, and also violated the Due Process Clause of the Fourteenth Amendment.

As generally understood, a bill of attainder is an act of a legislative body that applies either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial. *Garner v. Board of Public Works v. City of Los Angeles,* 341 U.S. 716, 722.

Marshall points to a passing comment by Justice Black in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 143, as implying that an act by an administrative or executive branch of government may constitute a bill of attainder. We do not regard the language relied upon as

authority for thus expanding what appellant himself concedes to be the traditional role of a bill of attainder.

Assuming, without deciding, that the black book and accompanying letter are, in other respects, in the nature of bills of attainder, the fact that they were not legislative acts deprives them of status as bills of attainder in the constitutional sense.

Procedural due process requires that when, as a premise for administrative action, an agency of government makes a determination of adjudicative facts, one who has a sufficient interest or right at stake shall be afforded an evidentiary hearing before the agency, except in the rare circumstance when some other interest, such as national security, justifies an overriding of such interest. See Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 199 (1956). We accept Professor Davis' definition of "adjudicative facts":

> "Adjudicative facts are facts about the parties and their activities, businesses, and properties, usually answering the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." (*ibid.*)

Measured by the foregoing definition, the facts determined by the board and commission as a premise for inclusion of Marshall's name in the black book and accompanying letter—that he is a person of notorious or unsavory reputation, and is a person who has an extensive police record—are adjudicative facts. It may

be seriously questioned, however, whether his wish to enter and obtain service in a licensed gambling establishment constitutes an interest or right sufficient to entitle him to assert this due process claim.[8]

But, passing this, we believe there is another circumstance present here which precludes Marshall from asserting this due process claim. Under Regulation 5.010(3) persons who have an extensive police record are to be excluded from establishments which operate gambling casinos. The letter of March 29, 1960, which accompanied the black book, recites that the individuals named in that borchure are "persons who come within the provisions of subsection 3(e) . . ." of that regulation.

Marshall in effect concedes the correctness of the agency determination, implicit in its compilation of the black book, that he has an extensive police record.[9] In his complaint he alleged, in detail, his own police record extending from 1929 to 1955. In the pretrial order proposed by Marshall's counsel, but which was not signed by the judge, the same police record was set forth. At the trial, Marshall admitted that he had a police record, and no evidence to the contrary was submitted on his behalf. The trial court expressly found that Marshall has an "extensive" police record, and on this appeal he has not challenged that finding.

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[8]As required by the fact that Regulation 5.010 is not challenged by Marshall, we do not distinguish between the gaming and non-gaming areas of establishments which operate licensed casinos.

[9]In the pretrial order proposed by Marshall, he indicated his willingness to agree that the basis for his designation as an "undesirable" is his claimed criminal record, which is then set out in the proposed order. The trial court also so found, and Marshall has not questioned that finding.

In our opinion, one who concedes the correctness of an administrative determination of an adjudicative fact is not entitled to damages or injunctive relief in a civil rights action based on a claim that he was denied an evidentiary hearing in connection with the determination of that fact. Under the indicated circumstances, the due process claim is without substance and involves, at most, a technical violation which warrants neither an award of damages nor vindication in a court of equity.

This is not to say that administrative agencies may safely proceed to the determination of adjudicative facts without affording a hearing, on the assumption that the correctness of the factual determination can be sustained in court in the event a civil rights action is instituted. It is not the fact that the correctness of this factual determination has been upheld by the trial court in the present suit which renders Marshall's due process claim a mere technicality. The circumstance which does have that effect is the fact that Marshall himself concedes the correctness of that determination. It must be apparent that administrative agencies may not safely assume that, in other proceedings, they will be likewise relieved from liability which might otherwise attach if no evidentiary hearing is provided.

For the reasons indicated, and subject to the limitations stated, we hold that Marshall's claim based upon the failure to accord him an evidentiary hearing provides no basis for relief under the Due Process Clause.

Marshall argues that the action of the defendants in causing him to be ejected from the Desert Inn Hotel interfered with his right of privacy and repose guaranteed by the Fourth Amendment, made applicable to the states by the Fourteenth Amendment. He also con-

tends that the described action of the defendants demonstrates such arbitrariness and unreasonableness in the classification of Marshall as a person unfit to be on the premises of a gaming establishment as to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment.

These claims may or may not have merit as related to the provisions of Regulation 5.010 excluding described classes of persons from the entire premises of the establishments which operate licensed gambling casinos. But Marshall has not challenged the validity of that regulation and may not do so in this suit.[10] Proceeding, as we must, on the assumption that the regulation is valid, and in the light of Marshall's concession and the trial court finding that he is a member of one of the classes named therein, the ejectment of Marshall from the Desert Inn Hotel did not deprive him of any constitutionally-guaranteed right of privacy and repose, or right to be protected from an arbitrary or unreasonable classification.

Affirmed.

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[10]See note 5, above.

APPENDIX E.

Judgment.

United States Court of Appeals, For the Ninth Circuit.

John Marshall, Appellant, vs. Grant Sawyer, etc., et al., Appellees. No. 20,145.

Appeal from the United States District Court for the District of Nevada.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada, and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered August 10, 1966.

APPENDIX F.

Complaint for Injunction and Damages.

United States District Court for the District of Nevada.

John Marshall, Plaintiff, v. Grant Sawyer, as Governor of the State of Nevada; Nevada Gaming Control Board, Ray J. Abbaticchio, Jr., as Chairman, George Ullom, and Ned A. Turner, as Members, of the Nevada Gaming Control Board, Nevada Gaming Commission, Milton W. Keefer, as Chairman, Norman D. Brown, Bert Goldwater, James W. Hotchkiss and F. E. Walters, as Members of the Nevada Gaming Commission: D. I. Operating Co., a Nevada Corporation; Allen Roen, Ruby Colod, Don Borax, Arthur Ostap, J. G. Murray, Defendants. Civil No. 860.

Plaintiff alleges:

I.

Plaintiff, John Marshall, is a citizen of the United States and a resident and citizen of the State of Illinois.

II.

Defendant Grant Sawyer, is a citizen and resident of the State of Nevada. He is Governor of the State of Nevada and is charged with the duty of seeing that the laws of that state are faithfully executed, including the provisions of the Nevada Gaming Control Act (NRS A 1959, 427) and the regulations promulgated pursuant thereto.

Defendants Nevada Gaming Control Board and Nevada Gaming Commission, are the public administrative agencies of the State of Nevada charged with ad-

ministering the provisions of the said Nevada Gaming Control Act with respect to state gaming licenses.

Defendant Ray J. Abbaticchio, Jr. is the Chairman, and defendants George Ullom and Ned A. Turner are the Members of the Nevada Gaming Control Board. They are citizens and residents of the State of Nevada.

Defendant Milton W. Keefer is the Chairman and defendants Norman D. Brown, Bert Goldwater, James W. Hotchkiss and F. E. Walters are the Members of the Nevada Gaming Commission. They are citizens and residents of the State of Nevada.

Defendant D. I. Operating Co., hereinafter referred to as the Desert Inn or the Desert Inn Hotel is a Nevada corporation, doing business as, and operating, the Desert Inn Hotel in Las Vegas, Nevada and licensed by defendants Board and Commission under the said Nevada Gaming Control Act.

Defendants Allen Roen, Ruby Colod, Don Borax, Arthur Ostap and J. G. Murray are citizens and residents of the State of Nevada. They are employees and agents of defendant Desert Inn and at all times herein mentioned acted as, and within the scope of their employment as such.

III.

This Court has jurisdiction under 28 USC 1343(1), (3) and (4) and under 42 USC 1983 and 1985 (3).

This is a civil action arising under the Federal Civil Rights Act, 28 USC 1343 of which, provides in part:

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

"(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

". . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

"(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, . . ."

IV.

At a time and place unknown to plaintiff, but well known to defendants Sawyer, Board and the members thereof and Commission and the members thereof, said defendants entered into an agreement and adopted a policy to discriminate against and to bar plaintiff from the State of Nevada as a person designated by them as "undesirable."

In entering into said agreement and adopting said policy, the defendants Sawyer, Board and Commission and the members thereof intended that plaintiff be barred from registering at a hotel, from obtaining service in the dining room or coffee shop of a hotel, from sitting in the lounge or foyer of a hotel, from being in the casino or on the premises of a hotel at any time, for any occasion and under any circumstances.

Said agreement and policy included the compilation, publication and distribution by defendants Board and Commission and the members thereof, of an 8" x 10" booklet bound in black, commonly designated as the "Black Book", containing the names and pictures, including among them, plaintiffs, of persons designated as, and deemed "undesirable" by said defendants. All of this was done without notice or hearing to the persons so designated, including plaintiff.

To enforce said agreement and policy, the agreement and policy also included coercion, intimidation and inducement by said defendants, by threat of loss of license, upon the hotels of the State of Nevada to prevent the presence of plaintiff in the hotels.

V.

Pursuant to said agreement and policy, and to effectuate the same:

1. Defendant Sawyer, on or about November 2, 1960, publicly states:

> "I agree with any measures necessary to keep the hoodlums out of Nevada. The operators have a great responsibility to cooperate.
>
> "We might as well serve notice on underworld characters right now they are not welcome in Nevada and we aren't going to have them here."

In making said statement, defendant Sawyer knew what had happened to plaintiff, as described below in subparagraph 5 hereof, and it was in connection therewith and in the context thereof that said defendant was speaking.

2. The defendants Board and Commission and the members thereof, at a time unknown to plaintiff but

well known to said defendants, promulgated and issued, without notice or hearing to the persons designated therein, including plaintiff, the "Black Book" referred to in Paragraph IV above;

3. On or about March 29, 1960 said defendants Board and Commission and the members thereof, distributed said Black Book to hotel operators in the State of Nevada, accompanied by a letter, over the signature of defendant Abbaticchio, which reads in whole or in part, so plaintiff is informed and believes, and therefore alleges;

> "The attached booklet which will be revised and expanded periodically, contains descriptive data with photographs concerning 11 persons (here they are listed, including plaintiff).
>
> "In order to avoid the possibility of license revocation for 'unsuitable manner of operation' your immediate cooperation is requested in preventing the presence in any licensed establishment of all 'persons of notorious or unsavory reputation' including the above individuals as well as those who subsequently may be added to this list."

4. Defendants Board and Commission and the members thereof, personally or through their representatives, so plaintiff is informed and believes and therefore alleges, orally informed the recipients of said booklet and letter that unless said recipients acceded to the "request" of said defendants as contained in said letter they, the recipients, would lose their licenses.

5. Defendants took the following action against plaintiff:

On the evening of Friday, October 28, 1960, plaintiff was sitting in the lounge of the defendant, Desert

Inn Hotel. He was not committing and had not committed any public offense. Solely because of inducement and/or "request" by representatives of the defendant Board and Commission and the members thereof, led personally by defendant Abbaticchio who was present with the other representatives and to effectuate the aforementioned agreement and policy, defendants Roen, Colod, Borax, Ostap and Murray ousted plaintiff, under threat of physical force, from the hotel premises. A large number of persons was in the hotel and observed the ousting.

6. In order to harass and intimidate the hotel operators into ousting plaintiff from the hotels, representatives of the defendant Board and Commission and the members thereof, led personally by defendant Abbaticchio, on said evening of October 28, 1960 and others, confiscated cards and dice in the casinos of various hotels in Las Vegas, including those of the defendant Desert Inn, while games were in progress and in full view of public patrons. Such conduct is extremely detrimental to the gambling business of said hotels because, in the eyes of the public, such confiscation of dice and cards while games are in progress implies dishonesty on the part of the hotel operators; said defendants knew that such an impression would be, and they intended that it be given.

7. Defendant Abbaticchio, on or about October 29, 1960, publicly states:

> "There has been some failure of certain Strip operators to abide by an agreement with the control board not to entertain or provide or furnish facilities or cater to those people we consider un-

desirable and detrimental to the gaming industry because of their association with the underworld.

"...

"... We are attempting to get them (the reneging Strip operators) to cooperate with the control board."

In making said statement, defendant Abbaticchio knew what had happened to plaintiff, as described above in subparagraph 5 thereof, and it was in connection therewith and in the context thereof that said defendant was speaking.

VI.

Plaintiff is informed and believes and therefore alleges that the basis for the designation of plaintiff as an "undesirable" by defendants Sawyer, Board and Commission and the members thereof is the claimed "criminal record" of plaintiff, In point of fact the record of convictions of the plaintiff, aside from traffic tickets is as follows:

1. In 1929, in Chicago, Illinois, at the age of 18 years, plaintiff was placed on probation for one years for larceny of an automobile;

2. In 1931, in Chicago, Illinois, at the age of 20 years, plaintiff was convicted of petty larceny. His sentence was six months in the House of Correction and $1.00, which sentence plaintiff served and paid;

3. In 1932, in Milwaukee, Wisconsin, at the age of 21, plaintiff was convicted of advising the commission of a felony. He was sentenced to one to three years in the House of Correction. Plaintiff served 19 months of this sentence and was then paroled for the balance thereof; he fulfilled all the terms of his parole.

4. In 1938, in Berwyn, Illinois, at the age of 22, plaintiff was fined $1.00 for disorderly conduct.

5. In 1929, plaintiff was fined $50.00, $100.00 and $15.00 respectively, in one proceeding, for misdemeanors, the exact nature of which plaintiff does not now remember.

6. In 1955, in Beverly Hills, California, plaintiff was arrested on a week-end and charged with failing to register as an exconvict under the Beverly Hills exconvict registration ordinance. Plaintiff did not know that there was such an ordinance in Beverly Hills nor that he was required to register under it. On being told by the Chief of Police of Beverly Hills that the fine would undoubtedly be $50.00 if plaintiff appeared in court and that he could forfeit the bail, which had also been set at $50.00, and be free, plaintiff posted the $50.00 bail and forfeited it.

In 1960, the Supreme Court of the State of California, in the cases of *Abbott v. City of Los Angeles*, 53 Cal. 2d 674, and *Lambert v. Municipal Court of Los Angeles County*, 53 Cal. 2d 690 declared such an ordinance, as the Beverly Hills ordinance above referred to, to be unconstitutional.

VII.

Plaintiff's name at birth was Marshal Caifano. In 1955, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, in proceeding number 70653, plaintiff's name was legally changed to John Michael Marshall, which has been his name ever since.

VIII.

During the years 1953-1956, plaintiff was a citizen of the State of Nevada and a resident of Las Vegas.

Plaintiff owned some real property in Las Vegas which he sold in 1954. The payments on the note, which was given for payment and which is secured by a mortgage, have not been met and the matter is now in litigation in the Eighth Judicial District in Las Vegas, Nevada. It is necessary for plaintiff to come to the State of Nevada and to Las Vegas in connection with this litigation, including consultation with counsel; and in order to negotiate for the sale of his interest in the property or to develop it.

Plaintiff cannot stay at a hotel in the State of Nevada for the reason that if he does, defendants Sawyer, Board and Commission and the members thereof, pursuant to the agreement and policy above set forth will induce the operators of the hotel to oust plaintiff from the premises in the same manner as described above in Paragraph V, 5.

IX.

By reason of the public ousting of the plaintiff by defendants as above set forth, plaintiff was damaged, suffered humiliation, embarrassment, loss of the right to public accommodation and to freedom of movement. In addition to which, the incident was widely publicized in the public press in Las Vegas causing him further damage, humiliation, embarrassment and loss of said rights. Said publications are referred to herewith, incorporated herein as though fully set forth, and a copy of one thereof attached hereto as Exhibit "A".

WHEREFORE, plaintiff prays:

1. As to the defendant officials of the State of Nevada:

(a) For damgaes in the amount of $100.00 against each of the defendants Sawyer, Board, Commission, Abbaticchio, Ullom, Turner, Keefer, Brown, Goldwater, Hotchkiss and Walters;

(b) For an injunction restraining and enjoining defendants Sawyer, Board and Commission and the members thereof, their agents, employees or any one acting in concert with them or on their behalf, from giving effect to said policy and action of keeping plaintiff out of the State of, and hotels in, Nevada through said Black Book or said letter of March 29, 1960, and from causing, coercing or inducing the operators or employees of hotels in Nevada, by threat of cancellation of license or otherwise, to bar or eject plaintiff from their premises, or to refuse to give service or afford accommodations to plaintiff on the same basis as any other citizen;

2. For damages against the defendants Desert Inn, Allen Roen, Ruby Colod, Don Borax, Arthur Ostap and J. D. Murray in the sum of $150,000.00;

3. For costs of suit incurred herein;

4. For such other and further relief as to the Court shall seem just and proper.

W. Albert Stewart, Jr.
W. B. Beirne
A. L. Wirin
Attorneys for Plaintiff

Fred Okrand
of counsel

Filed Dec. 22, 1960.
Oliver F. Pratt, Clerk, By Ray Mana Smith, Deputy.